85-1973

No. .....

Supreme Court, U.S.
FILED
MAY 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

RICHARD POPE and CHARLES G. MORRISON,

Petitioners,

vs.

STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

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58 pp

QUESTIONS PRESENTED

1. Whether, in light of *Brockett v. Spokane Arcades, Inc.*, — U.S. —, 105 S.Ct. 2794 (1985), the Illinois Obscenity Statute, Ill.Rev.Stat. 1983, Ch. 38, ¶ 11-20, is unconstitutionally overbroad and therefore violative of the petitioners' rights under the First and Fourteenth Amendments to the Constitution of the United States.

2. Whether the third part of the constitutional tripartite test for obscenity articulated in *Miller v. California*, 413 U.S. 15 (1973) must be adjudged solely on an objective basis and not by contemporary community standards.

TABLE OF CONTENTS

SUBJECT INDEX

	Page
Questions Presented	i
Table of Contents	ii
Opinions Below	2
Jurisdiction	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	3
Reasons for Granting the Writ	4
Conclusion	12

APPENDIX INDEX

Opinion of the Second District Appellate Court for the State of Illinois in *People v. Pope* ..... App. 1

Opinion of the Second District Appellate Court for the State of Illinois in *People v. Morrison* ..... App. 25

Order of the Second District Appellate Court for the State of Illinois denying the Petition for Rehearing in *People v. Pope* ..... App. 34

Order of the Second District Appellate Court for the State of Illinois denying the Petition for Rehearing in *People v. Morrison* ..... App. 35

Order of Illinois Supreme Court denying Leave to Appeal in *People v. Pope* ..... App. 36

Order of Illinois Supreme Court denying Leave to Appeal in *People v. Morrison* ..... App. 37

United States Constitution, First Amendment and Fourteenth Amendment ..... App. 38

Illinois Obscenity Statute, Ill.Rev.Stat. 1983, Ch. 38, ¶ 11-20 ..... App. 39

TABLE OF AUTHORITIES

Pages

CASES

Brockett v. Spokane Arcades, Inc., — U.S. —, 105 S.Ct. 2794 (1985) 4, 5, 6, 9

City of Chicago v. Kimmel, 31 Ill. 2d 202, 201 N.E.2d 386 (1964) 7

Memoirs v. Massachusetts, 383 U.S. 413 (1966) 6

Miller v. California, 413 U.S. 15 (1973) 3, 5, 9, 10, 11

Penthouse International, Ltd. v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980) 11

People v. Gould, 60 Ill.2d 159, 324 N.E.2d 412 (1975) 8

People v. Morrison, 138 Ill.App.3d 595, 486 N.E.2d 345 (1985) 2

People v. Pope, 138 Ill.App.3d 726, 486 N.E.2d 350 (1985) 2, 4

People v. Ridens, (Ridens I), 51 Ill.2d 410, 282 N.E.2d 691 (1972), vacated and remanded as *Ridens v. Illinois*, 413 U.S. 912 (1973) 7

People v. Ridens, (Ridens II), 59 Ill.2d 362, 321 N.E.2d 264 (1974), cert. denied 421 U.S. 993, 95 S.Ct. 2000 (1975) 7, 10

People v. Sikora, 32 Ill.2d 260, 204 N.E.2d 768 (1965) 7, 8

People v. Ward, 63 Ill.2d 437, 349 N.E.2d 47 (1976)..... 7

Roth v. United States, 354 U.S. 476 (1957) 5, 6, 7, 8

Smith v. United States, 431 U.S. 291 (1977) 10, 11

State v. Princess Cinema of Milwaukee, Inc., 96 Wis.2d 646, 292 N.W.2d 808 (1980) 11

United States v. Bagnell, 679 F.2d 826 (11th Cir. 1982) 11

TABLE OF AUTHORITIES—Continued

Pages

United States v. Heyman, 562 F.2d 316 (4th Cir. 1977) 11

Ward v. Illinois, 431 U.S. 767 (1977) 4

STATUTES AND CONSTITUTIONAL PROVISIONS

28 U.S.C. § 1257(3) 2

Illinois Obscenity Statute, Ill.Rev.Stat. 1983, Ch. 38, ¶ 11-20 ..... 3, 6, 7

United States Constitution, First Amendment 3, 4, 12

United States Constitution, Fourteenth Amendment 3, 4

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STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

Petitioners respectfully pray that a writ of certiorari issue to review the judgments and opinions of the Appellate Court of the State of Illinois, Second District, entered on November 26, 1985.

OPINIONS BELOW

The opinion of the Appellate Court of the State of Illinois, Second District, in *People v. Pope,* is reported at 138 Ill.App.3d 726, 486 N.E.2d 350 (1985). A copy of the opinion is included in the Appendix as Exhibit A.

The opinion of the Appellate Court of the State of Illinois, Second District, in *People v. Morrison,* is reported at 138 Ill.App.3d 595, 486 N.E.2d 345 (1985). A copy of the opinion is included in the Appendix as Exhibit B.

JURISDICTION

Jurisdiction in this case is premised upon 28 U.S.C. § 1257(3) for review by certiorari of the decisions of the Illinois Appellate Court, Second District. Written opinions in both cases were issued by that court on November 26, 1985. Petitioners' timely petitions for rehearing were denied on December 31, 1985. Petitioners sought leave to appeal from the Illinois Supreme Court in a timely fashion. On April 2, 1986, the Illinois Supreme Court denied their petitions for leave to appeal. Copies of the orders denying the petitions for rehearing are included in the appendix as Exhibits C and D. Copies of the orders denying leave to appeal are included in the appendix as Exhibits E and F.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the First and Fourteenth Amendments to the Constitution of the United States and the Illinois Obscenity Statute, Ill.Rev.Stat. 1983, Ch. 38, ¶ 11-20, are set forth in the Appendix as Exhibits G and H.

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STATEMENT OF THE CASE

Petitioners, who were clerks in adult bookstores, were each charged with 3 counts of obscenity. The charges arose out of the sale of three magazines by each defendant at two different adult bookstores on the same date. After separate jury trials, each petitioner was convicted on all 3 counts.

Motions to dismiss were filed in both cases asserting that the Illinois Obscenity Statute was unconstitutionally vague, indefinite, uncertain, and overbroad and therefore violative of the petitioners' rights under the First and Fourteenth Amendments to the Constitution of the United States. Included within petitioners' constitutional argument was the assertion that the Illinois Obscenity Statute failed to require that the third prong of the tripartite test for obscenity under *Miller v. California*, 413 U.S. 15 (1973) be adjudged on an objective basis. The motions to dismiss were denied, as were the timely post-trial motions preserving the constitutional questions.

On appeal, the cases were consolidated for oral argument in the Appellate Court for the State of Illinois, Sec-

ond District. The Appellate Court addressed and rejected the constitutional arguments in its opinion in *People v. Pope*. It also rejected those arguments in *People v. Morrison*, by adopting that portion of its opinion from *People v. Pope* by reference.

Timely petitions for rehearing were filed by the petitioners in the Second District Appellate Court. Those petitions specifically raised this Court's opinion in *Brockett v. Spokane Arcades, Inc.*, — U.S. —, 105 S.Ct. 2794 (1985) as having significant impact on the constitutionality of the Illinois Obscenity Statute. In addition, the petitioners continued to assert that the Illinois Obscenity Statute was rendered infirm by its failure to require an objective standard on the third prong of the tripartite definition of obscenity. The petitions for rehearing were denied.

Timely petitions for leave to appeal were filed in the Illinois Supreme Court, again raising the same constitutional issues under the First and Fourteenth Amendments. The petitions for leave to appeal were denied. The mandate of the Illinois Supreme Court has been stayed pending review by this court.

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REASONS FOR GRANTING THE WRIT

I.

The Illinois Obscenity Statute Includes Within Its Reach Materials That Appeal To A Normal Interest In Nudity Or Sex, Contrary To The Proscription Of Brockett v. Spokane Arcades, Inc., — U.S. —, 105 S.Ct. 2794 (1985).

This case presents the important question of whether the Illinois Obscenity Statute is unconstitutionally over-

broad, both on its face and as applied, in light of this Court's decision in *Brockett v. Spokane Arcades, Inc.*, — U.S. —, 105 S.Ct. 2794 (1985). Although this Court narrowly rejected a constitutional attack upon the Illinois Obscenity Statute in *Ward v. Illinois*, 431 U.S. 767 (1977), the aspect of overbreadth raised here was not addressed by the Court in *Ward*.

The starting point for any review of obscenity legislation is *Miller v. California*, 413 U.S. 15 (1973). In *Miller*, this Court established new First Amendment standards applicable to obscenity prosecutions. The test, which is binding upon the states, was articulated as follows:

> The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.
>
> *Miller v. California*, 413 U.S. at 24-25 (citations and footnote omitted).

In *Brockett v. Spokane Arcades, Inc.*, — U.S. —, 105 S.Ct. 2794 (1985), this Court focused on the "appeals to the prurient interest" component of the *Miller* test. That component, which is contained in part (a) of the test, has been continuously stated and restated in the various tests for obscenity pronounced by this Court since 1957. *Roth*

v. United States, 354 U.S. 476 (1957); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966); *Miller, supra.*

In *Brockett*, this Court examined a Washington obscenity statute which included "that which incites lasciviousness or lust" within the definition of "prurient". In finding that definition unconstitutionally overbroad, this Court held that material which appeals only to a normal, healthy interest in sex may not be included within the definition of "prurient". In so holding, this Court had to resolve an ambiguity in the definition of "prurient" which was raised by footnote 20 of *Roth*. That footnote included use of the terms "lustful" and "lascivious".

On the issue of prurient interest, the Illinois Obscenity Statute itself is ambiguous and inconsistent. Its definitional section provides as follows:

> A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs.
>
> Ill.Rev.Stat. 1983, ch. 38, ¶ 11-20(b).

However, a later section entitled "Interpretation of Evidence" provides as follows:

> In any prosecution for an offense under this Section evidence shall be admissible to show:
>
> * * *
>
> (2) What the predominant appeal of the material would be for ordinary adults or a special audience, and

> what effect if any, it would probably have on the behavior of such people;
>
> Ill.Rev.Stat. 1983, ch. 38, ¶ 11-20(c) (2).

On one hand, the statute speaks in terms of "a shameful or morbid interest in nudity, sex, or excretion" while, on the other hand, evidence relating to the "predominant appeal of the material" is allowable, which would include that relating to a normal, healthy interest in sex.

The Illinois Supreme Court has not cured this problem through judicial construction. Rather, it has contributed to the problem during its long history of construing obscenity statutes and ordinances. Throughout that history, the Illinois Supreme Court has typically relied upon constitutional terms and interpretations of this Court, including the opinion in *Roth v. United States,* 354 U.S. 476 (1957). *See City of Chicago v. Kimmel,* 31 Ill.2d 202, 204-206, 201 N.E.2d 386, 387-388 (1964); *People v. Sikora,* 32 Ill.2d 260, 261, 265, 204 N.E.2d 768, 769, 771 (1965); *People v. Ridens,* (*Ridens I*), 51 Ill.2d 410, 413-414, 282 N.E.2d 691, 693-694 (1972), vacated and remanded as *Ridens v. Illinois,* 413 U.S. 912 (1973); *People v. Ridens,* (*Ridens II*), 59 Ill.2d 362, 365-375, 321 N.E.2d 264, 266-271 (1974), cert. denied 421 U.S. 993, 95 S.Ct. 2000 (1975); *People v. Ward,* 63 Ill.2d 437, 439-441, 349 N.E.2d 47, 48-49 (1976).

In *People v. Sikora,* 32 Ill.2d 260, 204 N.E.2d 768 (1965), the Illinois Supreme Court addressed a constitutional attack on the Illinois Obscenity Statute concerning the issue of appeal to the prurient interest. The Court referred to comments from the proposed official draft of the Model Penal Code (the same tentative draft mentioned

in footnote 20 in *Roth*), and placed further weight on the commentary accompanying the obscenity statute from the drafting committee of the 1961 Illinois Criminal Code. The Court stated:

> Moreover, the joint committee which drafted the proposed Illinois Criminal Code of 1961 stated in its comments: "Under subsection (b) *material must appeal to sexual interest* (*or interest in nudity or excretion*), but it must also go beyond customary limits of candor in the description in such things." Tentative Final Draft of the Proposed Illinois Criminal Code of 1961, p. 275.
>
> *People v. Sikora,* 32 Ill.2d at 262, 204 N.E.2d at 770. (emphasis added)

Thus, neither the committee draftsmen, nor the Court in *Sikora,* prohibited the obscenity statute's reach to normal, healthy matters relating to sex. The court had accepted the *Roth* principles, including the ambiguity inherent in footnote 20, without question.

Although the Illinois Supreme Court has had a practice of reviewing publications to determine whether or not they were constitutionally protected, such review has also failed to exclude materials which appealed only to a normal interest in nudity or sex. In fact, that Court has never held that the material being reviewed did not appeal to a prurient interest and, therefore, enjoyed constitutional protection.

The Illinois Supreme Court's independent review in *People v. Gould,* 60 Ill. 2d 159, 324 N.E.2d 412 (1975), is particularly instructive. In *Gould,* the Court described a category of magazines which contained photographs of nude or nearly nude females with no suggestion of sexual activ-

ity. The Court concluded that these magazines met the tripartite definition for obscenity, but pronounced no reasons why such magazines appeal to a prurient interest as opposed to a normal, healthy interest in sex. The magazines described were not the type of "hard core" material meant to be addressed by the constitutional guidelines pronounced in *Miller v. California,* 413 U.S. 15 (1973). By including this type of material, which is similar to *Playboy, Penthouse,* and *Hustler,* the Court placed a construction on the statute which would allow it to reach material that appealed to a normal interest in nudity or sex, as opposed to a shameful or morbid interest.

Under the Illinois Obscenity Statute. material that appeals only to a normal, healthy interest in sex, but which otherwise contains patently offensive sexual conduct and is utterly without redeeming social value, can be criminally proscribed. In light of the principles articulated in *Brockett v. Spokane Arcades, Inc.,* — U.S. —, 105 S.Ct. 2794 (1985), such a proscription is unconstitutionally overbroad on its face and as applied by the Illinois Supreme Court and infringes upon rights protected by the First and Fourteenth Amendments.

II.

The Illinois Obscenity Statute, As Written And Construed, Fails To Require That The Third Prong Of The Tripartite Test For Obscenity Under Miller v. California, 413 U.S. 15 (1973), Be Adjudged On An Objective Basis.

This case presents the important question of whether the third prong of the tripartite test for obscenity articulated by *Miller v. California,* 413 U.S. 15 (1973), must be adjudged solely on an objective basis as opposed to refer-

ence to contemporary community standards. The lower court resolved the issue by stating that this Court has never held that an objective standard is required.

While the Illinois Obscenity Statute has been construed to include the *Miller* standards, the Illinois Supreme Court has chosen to adopt the "utterly without redeeming social value standard" for the third prong of the tripartite test. *People v. Ridens* (*Ridens II*), 59 Ill.2d 362, 321 N.E.2d 264 (1974). In terms of determining whether a subjective or objective test should be applied, however, it is of no importance whether the "utterly without redeeming social value" standard is used or the standard of *Miller* ("whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value").

In *Smith v. United States*, 431 U.S. 291 (1977), this Court observed that community standards—i.e. subjective standards—apply only to the first two prongs of the three part test:

> The phrasing of the *Miller* test makes clear that contemporary community standards takes on meaning only when they are considered with reference to the underlying questions of fact that must be resolved in an obscenity case. The test itself shows that appeal to the prurient interest is one such question of fact for the jury to resolve. The *Miller* opinion indicates that patent offensiveness is to be treated in the same way. 413 U.S. at 26, 30, 93 S.Ct. at 2616, 2618. *See Hamling v. United States*, 418 U.S. at 104-105, 94 S.Ct. at 2900-2901. The fact that the jury must measure patent offensiveness against contemporary community standards does not mean, however, that juror discretion in this area is to go unchecked. Both in *Hamling* and

> in *Jenkins v. Georgia,* 418 U.S. 153, 94 S.Ct. 2750, 41 L.Ed.2d 642 (1974), the Court noted that part (b) of the *Miller* test contained a substantive component as well. The kinds of conduct that a jury would be permitted to label as "patently offensive" in a § 1461 prosecution are the "hard core" types of conduct suggested by the examples given in *Miller. See Hamling v. United States,* 418 U.S. at 114, 94 S.Ct. at 2906; *cf. Jenkins v. Georgia,* 418 U.S. at 160-161, 94 S.Ct. at 2754-2755. Literary, artistic, political, or scientific value on the other hand, is not discussed in *Miller* in terms of contemporary community standards. See generally F. Schauer, The Law of Obscenity 123-124 (1976).
>
> *Smith v. United States,* 431 U.S. 291, 301-302 (1977).

Consistent with *Smith,* at least three circuits have explicitly recognized that the third prong of the tripartite test does not have a subjective component and, therefore, may not be decided by reference to contemporary community standards. *United States v. Heyman,* 562 F.2d 316 (4th Cir. 1977); *Penthouse International, Ltd. v. McAuliffe,* 610 F.2d 1353 (5th Cir. 1980); and *United States v. Bagnell,* 679 F.2d 826 (11th Cir. 1982). In addition, the Wisconsin Supreme Court invalidated the Wisconsin Obscenity Statute because of its failure to require an objective test relating to the third element. *State v. Princess Cinema of Milwaukee, Inc.,* 96 Wis.2d 646, 292 N.W.2d 808 (1980).

The failure of the Illinois Obscenity Statute, either as written or construed, to require the third part of the test for obscenity to be judged objectively clearly runs afoul of constitutional principles articulated by this Court and is in conflict with other courts which have decided the issue.

That failure results in the statute being overbroad, as well as vague, with the statute offering no guidance or notice to a putative defendant. First Amendment guarantees require that the Illinois Obscenity Statute be invalidated.

———o———

CONCLUSION

Because of the importance of the questions presented and their impact upon First Amendment interests, this Court should grant a writ of certiorari to review the judgments and opinions of the Appellate Court of Illinois, Second District.

Respectfully submitted,

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EXHIBIT A

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

RICHARD POPE,

Defendant-Appellant.

Second District No. 2—84—1067

Affirmed in part, and reversed in part and remanded.

Opinion filed November 26, 1985.—Rehearing denied December 31, 1985.

Appeal from the Circuit Court of Winnebago County; the Hon. Robert J. French, Judge, presiding.

Glenn A. Stanko and J. Steven Beckett, both of Reno, O'Byrne & Kepley, of Champaign, and Daniel Cain, of Sreenan & Cain, of Rockford, for appellant.

Daniel Doyle, State's Attorney, of Rockford (John X. Breslin and Terry A. Mertel, both of State's Attorneys Appellate Service Commission, of counsel) for the People.

JUSTICE HOPF delivered the opinion of the court:

Defendant, Richard Pope, was charged with three counts of obscenity (Ill. Rev. Stat. 1983, ch. 38, par. 11—

20(a) (1)), each dealing with the sale of an allegedly obscene magazine. At a jury trial defendant was found guilty on all three counts. At a subsequent sentencing hearing the trial court imposed concurrent sentences of 120 days on each of the counts as well as consecutive fines of $1,000 on each count. Defendant filed a timely notice of appeal.

In this court defendant contends: (1) that the Illinois Obscenity Statute (Ill. Rev. State. 1983, ch. 38, par. 11—20) is unconstitutionally vague, indefinite, uncertain and overbroad; (2) that the information under which defendant was charged failed to allege the necessary material definitional elements of obscenity and, therefore, was legally insufficient; (3) that the trial court abused its discretion in prohibiting defendant's *voir dire* examination designed to determine the jurors' bias or prejudice towards materials depicting sexual intercourse; (4) that the trial court erred in admitting certain photographs into evidence; (5) that the trial court erred in giving a combined issues instruction on all three counts of obscenity and in refusing defendant's tendered instruction relating to contemporary community standards; (6) that defendant was not proved guilty beyond a reasonable doubt; and, (7) that the trial court abused its discretion in sentencing the defendant.

On July 21, 1983, at approximately 9 a.m., Detective John Versetti of the Rockford police department went to

an adult book store located at 623 7th Streeet. A sign on the exterior of the premises designated the store as an "Adult Book Store" and also indicated that patrons must be 18 years of age to enter. Upon entering the store the officer paid defendant, who was located at the counter, a 50¢ browsing fee. Versetti extensively described the interior of the store, pointing out that the store contained numerous magazines and films depicting all types of sexual activity, marital aids and movie booths whose exterior doors depicted the type of sexual film one could view by entering the booths.

Versetti browsed for about 10 to 15 minutes, selecting three magazines, Full Throttle, Fuck Around, and Anal Animal, all of which were later admitted into evidence. Versetti placed the magazines face down on the counter. Defendant picked each one up and turned it over to get the sticker price on the front. The price of each magazine was $8.50. Defendant asked for the officer's browsing slip so as to apply it to the price of the magazines and then tried to ring the prices up on the cash register. When defendant could not get the register to work, he commented that he was new at the store, did not know how to fix the register, and asked Versetti to return later when the register was fixed. The officer did return later in the morning at approximately 10 o'clock and purchased from the defendant the three magazines the officer had earlier left with the defendant.

Jack Rinehart, a detective assigned to the identification section of the Rockford police department, also testified on behalf of the State. Rinehart stated that on July 21, 1983, at about 3:45 p.m. he had taken photographs of the exterior and interior of the adult book store at 623 7th Street where defendant worked. During his testimony it was revealed that the photographs had been mislabeled in that the address written on the back of them stated "519 7th Street" insead of "623 7th Street." The officer explained that this confusion had occurred because pictures had been taken the same day of another store located at 519 State Street. Rinehart testified that he knew the pictures being introduced into evidence were the ones he took because he and the photographer who took the pictures of the State Street store put their photographs in separate envelopes and that the developed pictures now being displayed were those that returned in the envelope for the 7th Street Store.

On cross-examination Rinehart admitted that he had no independent knowledge whether the pictures which constituted the State's exhibits Nos. 10 through 17 and which portrayed the interior of an adult book store, showed what exactly was in the 7th Street store. On redirect examination, however, Rinehart pointed out that the case number for the instant case appeared on the back of each photograph as well as the date and time the pictures were taken and the name of the photographer (the witness) who took the pictures. Additionally, Rinehart stated that he had not participated in nor handled the evidence for the State Street case.

Defendant objected on relevancy grounds to the admission of the State's exhibits Nos. 7 and 8, depicting the counter area of the book store. Defendant also objected to the State's exhibits Nos. 9 through 17, interior shots of the store, based on the fact that there had not been adequate foundation for their admission. The trial court admitted the State's exhibits Nos. 7 through 17 into evidence.

Defendant's first witness was Philip Lark, a college student. Lark testified that he had been employed by defense counsel to visit adult book stores in Winnebago, Champaign, Rock Island, McLean, Macon and Sangamon counties, to determine the availability and acceptability of sexually explicit materials at these various locations. The witness described the exterior and interior of each book store he visited and the clientele he encountered in each as well as the magazines he purchased in the stores. Lark stated that the materials purchased by him accurately contained pictorial portrayals of the sexual activity observed in publications and other materials available in each book store visited, including heterosexual and homosexual conduct, traditional, anal and oral intercourse, and group sex.

Defendant also presented an expert witness, Dr. Roderick Bell, a social scientist, who testified regarding a 1983 public opinion poll he had conducted of 800 people in Illinois. The poll was designed to sample and report the attitude of adults living within the State regarding the depiction of sexually explicit materials. It was Dr. Bell's opinion that the results of the survey showed that a trend existed from 1978 to 1983 towards greater acceptance of the dissemination of sexually explicit materials for adults only. On cross-examination, Dr. Bell explained that "con-

sensus'' meant ''agreement,'' and that in his survey consensus by those who were tested was found in only one question. According to Bell, the lack of consensus would indicate that there was no standard.

At the jury instruction conference, over defendant's objection, the State's issues instruction, which combined all three counts into one instruction, was given. (State's instruction No. 10.) Defendant's instructions Nos. 3, 4 and 5, which were separate issues instructions for each of the three counts, were refused. Defendant's instruction No. 7, relating to proof of contemporary community standards, was also rejected.

The jury found defendant guilty of the crime of obscenity on all counts. The defendant filed a timely post-trial motion, which was denied.

At the sentencing hearing, no presentence report was submitted to the trial judge and no evidence in aggravation was presented by the State. Betty Pope, defendant's mother, and Nancy Gorzny, a long-time friend, testified in defendant's behalf, speaking favorably of defendant's character and reputation in his community. Both witnesses acknowledged that defendant was still employed at the adult book store. At the conclusion of the hearing, the court imposed sentences of 120 days on each of the three counts and consecutive fines of $1,000 on each count. The court provided no reasons for defendant's imprisonment other than an allusion to his continued employment at the adult book store.

•1 Defendant's first contention is that the Illinois obscenity statute (Ill. Rev. Stat. 1983, ch. 38, par. 11—20) is unconstitutional because it provides little guidance to

persons who might be affected by it. This contention is without merit as the Illinois Supreme Court has consistently held that the obscenity statute is not impermissibly vague or overbroad, that prohibitions are clear, and that it does not invade areas of personal freedom. *People v. Ridens* (1974), 59 Ill. 2d 362, 321 N.E.2d 264; *People v. Ward* (1976), 63 Ill. 2d 437, 441, 349 N.E.2d 47.

Additionally, defendant argues that the Illinois obscenity statute is constitutionally weak because (1) it allows the trier of fact to consider the effect of allegedly obscene materials on children as part of the relevant community; (2) it fails to require the application of an objective standard as opposed to a contemporary community standard in finding that allegedly obscene material is "utterly without redeeming social value"; and, (3) it fails to allow an affirmative defense for dissemination to all adults instead of certain special classifications of persons.

•2 Defendant's argument that the obscenity statute is unconstitutionally weak because it permits children to be included in determining the relevant community standard is equally without merit. The obscenity statute specifically addresses this challenge. Section 11—20(c) of the statute states that "[o]bscenity shall be judged with reference to ordinary adults" and that children should be considered as part of the relevant community only when the allegedly obscene materials are designed for or directed to children. (Ill. Rev. Stat. 1983, ch. 38, par. 11—20(c).) Thus, unless children are the intended recipients of the allegedly obscene materials at issue in the case, they cannot be included as part of the community in an obscenity case.

•3 Defendant next challenges the obscenity statute on the basis that a constitutional infirmity exists because an objective standard as opposed to a contemporary community standard should be required in determining if allegedly obscene materials are utterly without redeeming social value." To support this contention, defendant relies heavily on a Wisconsin Supreme Court case (*State v. Princess Cinema of Milwaukee, Inc.* (1980), 96 Wis. 2d 646, 292 N.W.2d 807), in which that court refused to further judicially construe the Wisconsin obscenity statute and called upon the Wisconsin legislature to redefine obscenity so as to agree with the most recent United States Supreme Court cases in the area of obscenity. However, *Princess Cinema* is distinguishable from the case at bar because Illinois courts have never been reluctant to construe the constitutionality of the Illinois obscenity statute. It should also be noted that, thus far, the United States Supreme Court has never held that an objective standard as opposed to a community one should be applied in adjudging if materials are "utterly without redeeming value."

•4 Last, defendant contends the Illinois obscenity statute is vague because it fails to allow an affirmative defense for dissemination to all adults instead of certain special classifications of persons. Defendant presents no argument for this contention but merely refers this court to a New York case in which that court held that the New York obscenity statute must be interpreted to permit dissemination to any adult. (*People v. Wrench* (1975), 83 Misc. 2d 95, 371 N.Y.S.2d 833.) This court chooses not to address this argument, as the New York case has no precedential value in this court (*Ladd Construction Co. v. In-*

surance Co. of North America (1979), 73 Ill. App. 3d 43, 47, 391 N.E.2d 568), and no similar holding has even been reached by the United States Supreme Court.

•5 Finally, since the Illinois Supreme Court has declared the Illinois obscenity statute to be constitutional, the defendant is in the wrong forum for the relief he seeks. When the supreme court of this State has declared the law in any point, only it can overrule and modify its opinion, and an appellate court is bound by its decision. *Village of Morton v. Thomas* (1983), 116 Ill. App. 3d 676, 680, 452 N.E.2d 865; *People v. Tannahill* (1976), 38 Ill. App. 3d 767, 770-71, 348 N.E.2d 847.

•6 Defendant's second contention is that the information charging him with three counts of obscenity was insufficient because it did not incorporate the definition of obscenity. Defendant argues that the failure to include the necessary definitional elements of obscenity in the information prevented defendant from receiving adequate notice of the charge against him so as to prepare a defense. This court has previously rejected a similar argument in *People v. Bailey* (1984), 125 Ill. App. 3d 346, 465 N.E.2d 979. Based on our opinion in *Bailey*, and on the charging instrument in the instant case, we see no reason why this court should not adhere to our reasoning and decision set forth in *Bailey* and reject defendant's argument that the information was legally insufficient because it failed to allege the necessary definitional elements of obscenity.

Next, defendant contends that the trial court abused its discretion in limiting defendant *voir dire* examination by not allowing defendant to ask certain questions designed to determine prospective jurors' bias and precon-

ceived notions regarding sexually explicit material. Conversely, the State argues that in sustaining the State's objections to defendant's questions, the court was properly applying Supreme Court Rule 234. See 87 Ill. 2d R. 234.

•7, 8 The purpose of *voir dire* is to assure the selection of an impartial jury. (*People v. Jackson* (1977), 69 Ill. 2d 252, 260, 371 N.E.2d 602; *People v. Chamness* (1984), 129 Ill. App. 3d 871, 873, 473 N.E.2d 476.) But, no precise technical test or formula exists for determining whether a prospective juror will possess the appropriate degree of impartiality. (*People v. Washington* (1982), 104 Ill. App. 3d 386, 390, 432 N.E.2d 1020.) As a result, circuit courts are granted broad discretion in conducting and managing *voir dire* (87 Ill. 2d R. 234), and the determination whether to ask certain questions of prospective jurors is within this discretion. (*People v. Chamness* (1984), 129 Ill. App. 3d 871, 873, 473 N.E.2d 476.) "*Voir dire* questioning may not be used as a means for pre-educating and indoctrinating prospective jurors as to a particular theory or defense or impanelling a jury with particular predispositions [citation], nor may the questions concern matters of law or instructions [citations]." 129 Ill. App. 3d 871, 873-74, 473 N.E.2d 476.

•9 Limitations of *voir dire* questioning may constitute reversible error if it results in denying a party a fair opportunity to probe an important area of potential bias or prejudice among prospective jurors. (*Gasiorowski v. Homer* (1977), 47 Ill. App. 3d 989, 991, 365 N.E.2d 43.) Here, in the instant case, defense counsel had been permitted to ask various questions referring to the prospective jurors' knowledge or familiarity with sex magazines, X-rated movies, and adult book stores. The jurors were

also asked if their religious beliefs would influence their ability to decide the case fairly, and if they had any predispositions, one way or another, regarding the existence of adult book stores. This court is of the opinion that these questions and others of a similar nature were sufficient to establish any bias or preconceived notions regarding sexually explicit materials. Moreover, those jurors who expressed doubts regarding their ability to be impartial, based either on their religious or personal beliefs, were excused for cause by defense counsel.

•10 The four questions which were prohibited by the trial court were unnecessary for a determination of the prospective jurors' bias or prejudice. Rather, we agree with the trial court's comment in sustaining the State's objections that defendant's questions were designed to ask the jurors to predecide the case. The questions defense counsel sought to be asked suggest that the defendant was "seeking particular kinds of jurors, rather than simply fair and impartial jurors, the latter of which were all defendant was entitled to have serve." *(People v. Phillips* (1981), 99 Ill. App. 3d 362, 368, 425 N.E.2d 1040.) In this respect, the questions were inappropriate and violative of Supreme Court Rule 234 (87 Ill. 2d R. 234), and it would have been error for the trial court to permit defendant to ask them .

•11 Additionally, defendant complains that the prohibition of the contested questions prevented him from learning if the prospective jurors could set aside their personal opinions and apply the contemporary community standards. Defendant argues that in *Smith v. United States* (1977), 431 U.S. 291, 52 L Ed. 2d 324, 97 S. Ct. 1756, the Supreme Court approved specific *voir dire* with respect

to community standards. Although this is a true statement, none of defendant's questions centered upon or was concerned with the jurors' perceptions of community standards. Moreover, during the *voir dire,* inquiries were made of prospective jurors regarding their knowledge of community standards towards sexually explicit materials and their willingness to apply these standards. Those jurors who indicated that their personal opinions could affect their deliberation were excused by defense counsel. The standard for evaluating the trial court's exercise of discretion in deciding whether to permit or refuse supplemental questions posed by the parties during the *voir dire* process is whether the means employed to test the prospective jurors' impartiality have created a reasonable assurance that prejudice would be discovered if present. (*People v. DeSavieu* (1983), 120 Ill. App. 3d 420, 427, 458 N.E.2d 504; *People v. Washington* (1982), 104 Ill. App. 3d 386, 390, 432 N.E.2d 1020.) This court believes that the questioning in its entirety was sufficient to determine the prospective jurors' bias and prejudice concerning sexually explicit materials and, therefore, the trial court's prohibition of the contested questions did not amount to an abuse of the trial court's discretion.

Defendant's fourth contention is that the trial court erroneously admitted 11 photographs (State's exhibits Nos. 7 through 17) into evidence over defendant's objections. Defendant argues that the photographs lacked proper foundation for admissibility. The State responds that defendant has waived this issue by failing to object on this ground at the trial level or in defendant's post-trial motion. It is apparent, however, from the trial transcript that while objections to State exhibits Nos. 7 and 8 were

based on relevancy, objections to State exhibits Nos. 9 through 17 were based on foundation grounds. In fact, the State concedes this fact. Nevertheless, the State argues that because exhibits Nos. 7 and 8 were based on relevancy at trial and because all of the photographs were classified as not relevant in defendant's post-trial motion, then defendant has waived foundation objections in this court.

•12 An objection to evidence based upon a specific ground is a waiver of objection on all grounds not specified. (*People v. Andrews* (1982), 105 Ill. App. 3d 1109, 1112, 435 N.E.2d 706.) If defendant had objected to all of the photographs at trial based on relevancy grounds, then his contention in this court that their admission was erroneous because they lacked foundation would be deemed to be waived. However, as previously stated, only two photographs were objected to on relevancy grounds; the remainder were objected to on the ground of lack of foundation. Thus, defendant has waived the lack of foundation argument only as it pertains to State exhibits Nos. 7 and 8 and not as it pertains to exhibits Nos. 9 through 17.

•13 Defendant's lack of foundation argument centers on the fact that the officer providing the foundation testimony for the photographs was unable to express independent knowledge of the pictures (State's exhibits Nos. 10 through 17), depicting the interior of the book store at 623 7th Street where defendant worked, without looking at the identification tags on the back of the pictures. However, the officer's testimony also showed that he took pictures only of the book store at 623 7th Street, that he put

the developed photos of that book store in the evidence envelope, that the address "519 7th Street" on the back of the photographs had to be incorrect because there was no adult book store at that location, that the case number on the back of the pictures was identical to the case number of the instant case, that the officer's name, as photographer, appeared on the back of each photo in question, and that the time at which the officer had taken the pictures also appeared on the back of the photographs.

To admit photographs into evidence, it is necessary that the photographs be identified by a witness as a portrayal of certain facts relevant to an issue of the case and be verified on personal knowledge as a correct representation of those facts. (*People v. Rolon* (1979), 71 Ill. App. 3d 746, 751, 390 N.E.2d 107; *Casson v. Nash* (1977), 54 Ill. App. 3d 783, 795, 370 N.E.2d 564.) Although the officer in the instant case admitted he had no independent knowledge if what was portrayed in State's exhibits Nos. 10 through 17 was what actually was contained in the 623 7th Street store, other testimony by the officer regarding the markings on the back of the exhibits and the fact that the officer took photos only of the 623 7th Street store supported the State's case that the pictures correctly represented the interior of the store.

•14 The fact that the photographs were taken at about 3:45 p.m. or 4 p.m. whereas defendant was arrested in the morning does not affect their relevancy, as defendant claims. No testimony or other evidence was presented at trial to indicate that there had been a material change in the appearance and condition of the interior of the book store. Moreover, this was not a situation where the in-

terior was likely to be posed or altered in any way. We believe the photographs were taken at a time sufficiently soon after defendant's arrest to make them relevant and accurate.

•15, 16 The admissibility of photographs is within the sound discretion of the trial court (*City of Chicago v. Scandia Books, Inc.* (1981), 102 Ill. App. 3d 292, 299, 430 N.E.2d 14; *Casson v. Nash* (1977), 54 Ill. App. 3d 783, 796, 370 N.E.2d 564), and it is our opinion that the trial court did not abuse its discretion in admitting all of the photographs. However, even if this court had determined that the trial court abused its discretion, we would rule that the admission of the photographs merely constituted harmless error. That the photographs were harmless is evident from Officer Versetti's testimony regarding the interior of the store at the time of his purchases and his verification of the magazines purchased, which were admitted into evidence without objection, and which were illustrative of the other graphic and explicit materials for sale within the adult book store.

Defendant next argues that by combining all three counts into one issues instruction (State's instruction No. 10) the jury was not allowed to apply the elements necessary for conviction of the crime of obscenity to each magazine separately. As a result, the instruction was misleading and confusing and defendant's instructions Nos. 3, 4, and 5, which allowed for separate consideration of each count, should have been given instead.

•17 Defendant's instructions Nos. 3, 4, and 5, which were separate issues instructions for each allegedly obscene magazine sold by defendant, were three nonpattern

instructions and were refused in light of the court's decision to tender the State's instruction No. 10. On the other hand, State's instruction No. 10 was taken from the Illinois Pattern Jury Instructions (IPI), Criminal, No. 9.60 through 9.61 (2d ed. 1981), and unless the trial court determines that a pattern instruction does not accurately state the law, that instruction should be used. 87 Ill. 2d R. 451 (a); *People v. Haywood* (1980), 82 Ill. 2d 540, 545, 413 N.E.2d 410.

•18-20 Jury instructions should not be misleading or confusing *(People v. Gathings* (1981), 99 Ill. App. 3d 1135, 1139, 425 N.E.2d 1313) and the jurors are properly instructed if all the instructions, construed together, properly inform them of the applicable law. *(People v. Gerecke* (1977), 45 Ill. App. 3d 510, 517, 359 N.E.2d 1178.) Moreover, any confusion or ambiguity in an instruction may be cleared up by another instruction *(People v. Jones* (1975), 26 Ill. App. 3d 78, 85, 325 N.E.2d 56), or by closing arguments of counsel. *(People v. Gerecke* (1977), 45 Ill. App. 3d 510, 517, 359 N.E.2d 1178.) The decision whether to give a non-IPI instruction is within the discretion of the trial court. (*People v. Moore* (1980), 89 Ill. App. 3d 202, 209, 411 N.E.2d 579.) That discretion is abused if the court's refusal in giving the instruction has the result of not instructing the jury as to a defense theory of the case which is supported by some evidence. *People v. Wolfe* (1983), 114 Ill. App. 3d 841, 852, 449 N.E.2d 980.

Here, this court finds no abuse of the court's discretion in refusing defendant's instructions. The State's instruction No. 10 identified the elements of the offense of obscenity. Additionally, the jury was given separate verdict forms, both guilty and not guilty, for each of the three

magazines. Also, during *voir dire* the State had informed the jurors that there were separate counts against defendant and that each count had to be considered separately. Finally, the State informed the jury during closing argument that for each count of obscenity against defendant the jurors had to determine whether defendant sold a magazine, whether he knew the nature or contents of the magazine at the time he sold it, and whether the magazine was obscene. Thus, we find that the court's refusal to tender defendant's instruction Nos. 3, 4, and 5, which were separate issues instructions for each magazine sold, was not erroneous.

•21 Defendant also contends that the trial court erred in refusing defendant's instruction No. 7, a non-IPI instruction, which related to contemporary community standards. A non-IPI instruction should be used only if a pattern instruction does not contain an accurate instruction on the subject that the jury should be instructed upon and if the tendered non-IPI instruction is simple, brief, impartial and free from argument. (87 Ill. 2d R. 451(a); *People v. Wolfe* (1983), 114 Ill. App. 3d 841, 852, 449 N.E.2d 980.) Defendant's instruction No. 7 read as follows:

> "In the absence of evidence relating to contemporary community standards brought by the defendant, the trier of fact are the exclusive judges of what are the contemporary community standards.
>
> However, when the defendant provides evidence, such as survey evidence, pertaining to contemporary community standards, the jury must consider all competent evidence presented pertaining to what, if any, community standards exist."

The State maintains that the second paragraph of defendant's instruction No. 7 is argumentative because it

argues whether or not a community standard exists and, therefore, whether the offense of obscenity exists. This court is in agreement and would note also that the instruction is argumentative because the instruction singles out a piece of evidence, the survey, as the most important evidence in the case. Thus, on this basis alone this court concludes that defendant's instruction No. 7 is argumentative and that the trial judge was correct in refusing this instruction.

Moreover, the court did tender defendant's instruction No. 2 to the jury which specifically stated that in determining whether a magazine is obscene the jurors were not to use their own personal standards. Rather, they were to determine how the magazine would be viewed by ordinary adults in the whole State and not just by people in a single city, town, or region. Thus, this instruction defined the extent of the "community" by which the standard was to be measured and instructed the jury that it could not adopt a "community" lesser than Statewide.

•22 Defendant next argues that he was not proved guilty beyond a reasonable doubt of obscenity because the State failed to prove "*scienter*," *i.e.*, that defendant had knowledge of the nature of contents of the allegedly obscene magazines he sold. In support of this contention defendant cites this court's decision in *People v. Hart* (1981), 101 Ill. App. 3d 343, 427 N.E.2d 1352. However, *Hart* is distinguishable from the case at bar. In *Hart* the defendant was charged with making available to the public three allegedly obscene films located in an adult book store. This court found that the evidence did not establish that defendant knew which films an investigating officer was going to choose out of 36 possible choices nor that she knew that

the other 33 movies in the arcade section of the book store were obscene. 101 Ill. App. 3d 343, 351, 427 N.E.2d 1352.

In the instant case, it would stretch this court's imagination to believe that defendant did not know or should not have known of the contents of the three magazines that he sold to the officer. As Officer Versetti's testimony revealed, the adult book store where defendant worked contained numerous magazines, films, and movie booths, all of which freely exhibited sexual activity of all types. Additionally, Officer Versetti places the magazines to be purchased face down on the counter in front of defendant. Defendant had to turn them over to get the sticker price of each. In so doing defendant had to observe both the back and front covers of the three allegedly obscene magazines. We believe that one glance at the covers of the three magazines in question is sufficient to establish the obscenity of the magazines. It is well settled in Illinois that even casual examination of an obscene magazine cover is sufficient to establish a violation of the obscenity statute. (*People v. Moore* (1977), 53 Ill. App. 3d 75, 77, 368 N.E.2d 586; *People v. Doto* (1977), 53 Ill. App. 3d 62, 66, 368 N.E.2d 577; *People v. Glass* (1976), 41 Ill. App. 3d 43, 47, 353 N.E.2d 214.) Regardless of defendant's contention, that he was new at the book store, we find it difficult to believe that defendant would not be fully apprised of the type and character of the three magazines simply by looking at them. Additionally, the high price charged for the publications as well as the fact that a 50¢ browsing fee was charged as admission are indicative that defendant possessed the necessary *scienter*.

•23 Defendant also contends that he was not proved guilty beyond a reasonable doubt because he produced evi-

dence of contemporary community standards in the form of expert testimony regarding a survey of sexually explicit materials in adult book stores which the State was unable to rebut. However, as the State points out, the opinion of an expert need not be accepted. (*Merchants National Bank v. Elgin, Joliet & Eastern Ry. Co.* (1971), 49 Ill. 2d 118, 122, 273 N.E.2d 809; *People v. Slago* (1978), 58 Ill. App. 3d 1009, 1016, 374 N.E.2d 1270.) Moreover, the fact that the jurors did not adopt the standard which defendant's expert maintained the survey established does not mean the jurors did not apply any community standard at all.

Here, the jurors heard Dr. Roderick Bell's testimony regarding how his survey was conducted and what the results indicated. However, as brought out by the prosecution on cross-examination of Dr. Bell, the questions in the survey were phrased in such a manner that those taking the survey were asked their personal opinions regarding whether they thought it was all right, or not all right, for adults who so desired to purchase magazines at an adult book store or attend movies at an adult theater depicting nudity and sexual activities. As the prosecutor stressed, and Dr. Bell did not deny, many of the individuals surveyed could have deemed it appropriate for those who desired to frequent adult theaters and book stores to be allowed to do so, while they, the individuals in the survey, personally were opposed to such establishments. Thus, just because those surveyed deemed it all right for others to choose to view sexually explicit materials did not necessarily mean that the "community standard," as a whole, had changed.

•24 During *voir dire*, the State's closing argument, and the instructions given to the jury, emphasis was placed on the fact that the jurors were not to apply a personal

standard in finding the magazines obscene but rather a community standard for the State of Illinois. Because the jurors did not decide the case as defendant wished does not mean that the jurors did not consider the survey results in Dr. Bell's testimony or that they decided incorrectly. The jury heard and saw all of the evidence presented. It was for the jury to pass on the credibility of the witnesses, to weigh the evidence, and to draw all reasonable inferences therefrom; a reviewing court may not substitute its judgment simply because it would have decided differently. (*Koris v. Norfolk & Western Ry. Co.* (1975), 30 Ill. App. 3d 1055, 1058, 333 N.E.2d 217.) Thus, it is this court's opinion that the jury's determination that defendant was proved guilty beyond a reasonable doubt was correct.

•25 Defendant's last contention is that his sentence was improper because the trial court failed to make any of the findings required under section 5—6—1(a) of the Unified Code of Corrections when conditional discharge and probation are denied. (Ill. Rev. Stat. 1983, ch. 38, par. 1005—6—1(a).) Additionally, defendant argues that the trial court abused its discretion in denying defendant conditional discharge or probation.

Sections 5—6—1(a)(1) and (2) establish that a trial court may not deny probation or discharge unless the court is of the opinion that a defendant's imprisonment is necessary for the protection of the public or that probation or conditional discharge would deprecate the seriousness of a defendant's conduct and would be inconsistent with the ends of justice. (Ill. Rev. Stat. 1983, ch. 38, pars. 1005—6—1(a)(1), (2).) It is defendant's contention that the record must indicate that the sentencing judge is of the opinion that imprisonment is necessary based on the findings set

forth in sections 5—6—1(a)(1) or (2) and that the record in the instant case is void of any such indication.

Prior to sentencing defendant to concurrent terms of 120 days in the county jail on each count and to imposing consecutive fines of $1,000 on each count, the court's only comment regarding the imposition of the sentence was:

> "I believe there is a difference between Mr. Morrison and this gentleman. Mr. Morrison, if I remember the testimony and sentencing, had left the employment and, I think, removed himself from the jurisdiction."

Substantial compliance with sections 5—6—1(a)(1) and (2) is required but may exist even though the trial court does not expressly recite that "imprisonment is necessary for the protection of the public" or that "probation or conditional discharge would deprecate the seriousness of the offender's conduct and would be inconsistent with the ends of justice." (*People v. Cox* (1980), 82 Ill. 2d 268, 281, 412 N.E.2d 541; *People v. Roberts* (1983), 115 Ill. App. 3d 384, 388, 450 N.E.2d 451.) This court has previously stated that "[s]ubstantial compliance may be found in the trial court's discussion of the presentence report or the factors presented in the sentencing hearing." (115 Ill. App. 3d 384, 389, 450 N.E.2d 451.) However, where the record is completely silent "it would stretch the phrase 'substantial compliance' too far to find that, because the court presumably read and listened, its opinion may be deemed to have been stated." *People v. Turner* (1982), 110 Ill. App. 3d 519, 524, 442 N.E.2d 637.

In the instant case no presentence report had been submitted to the trial judge since defendant was sentenced for a misdemeanor offense as opposed to a felony. (Ill. Rev. Stat. 1983, ch. 38, par. 1005—3—1.) Additionally, the

State presented no evidence in aggravation; defendant had no history of prior criminality; and two witnesses who testified in mitigation spoke favorably of defendant. The trial court's sole comment, prior to imposing sentence, indicated that defendant's continued employment in the adult book store may have been the basis for the court's denial of probation or conditional discharge and the imposition of concurrent terms of imprisonment.

Defendant points out this appellate court in *People v. Hart* (1981), 101 Ill. App. 3d 343, 344, 427 N.E.2d 1352, found that it was improper for a trial court to impose a sentence of imprisonment on the basis that an individual was paid to work at an adult book store similar to the one at bar. In *Hart* this court stated that had it not already determined to reverse defendant's conviction on another basis, it would vacate defendant's sentence of imprisonment and remand for resentencing based on the court's improper consideration of defendant's paid work at the book store. Here, in the instant case, no reasons were expressed for the court's denial of a sentence of probation or conditional discharge other than an inference, derived from the disposition of another case, that defendant had continued his employment at the book store.

•26, 27 Normally, the trial court is "the proper forum in which a suitable sentence is to be determined and the trial judge's decisions in regard to sentencing are entitled to great deference and weight." *(People v. Perruquet* (1977), 68 Ill. 2d 149, 154, 368 N.E.2d 882; *People v. Jordan* (1985), 130 Ill. App. 3d 810, 814, 474 N.E.2d 1283.) The determination and imposition of a sentence involves considerable discretion. *(People v. Jordan* (1985), 130 Ill. App. 3d 810, 813, 474 N.E.2d 1283.) This court's standard of re-

view is whether the trial court exercised that discretion and whether it abused that discretion in imposing sentence. (*People v. Kuesis* (1980), 83 Ill. 2d 402, 408, 415 N.E.2d 323.) We believe the trial court's sole reference to the defendant in *People v. Morrison* (1985), 138 Ill. App. 3d 595, is an insufficient basis for its denial of probation or conditional discharge here.

For the reasons stated, we find that defendant's conviction is affirmed, but that his sentence be vacated and the case remanded for resentencing. This, the judgment of the trial court of Winnebago County is affirmed in part, reversed in part, and remanded.

Affirmed in part; reversed in part; and remanded.

STROUSE and UNVERZAGT, JJ., concur.

EXHIBIT B

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

CHARLES G. MORRISON, Defendant-Appellant.
Second District No. 2—84—0623

Judgment affirmed.

Opinion filed November 26, 1985.—

Rehearing denied December 31, 1985.

Appeal from the Circuit Court of Winnebago County; the Hon. Robert J. French, Judge, presiding.

Thomas R. Harris and J. Steven Beckett, both of Reno, O'Byrne & Kepley, of Champaign, and Daniel Cain, of Sreenan & Cain, of Rockford, for appellant.

Daniel Doyle, State's Attorney, of Rockford (John X. Breslin and Terry A. Mertel, both of State's Attorneys Appellate Service Commission, of counsel), for the People.

JUSTICE HOPF delivered the opinion of the court:

Defendant, Charles Morrison, was charged with three counts of obscenity, each dealing with the sale of an allegedly obscene magazine. (Ill. Rev. Stat. 1983, ch. 38, par. 11—20(a)(1).) At a jury trial defendant was found guilty on all three counts. Defendant was sentenced to conditional discharge for a period of 12 months and assessed a fine of $1,500. Defendant filed a timely notice of appeal.

On appeal, defendant contends: (1) that the Illinois obscenity statute is unconstitutionally vague, indefinite, and uncertain; (2) that the State's Instruction No. 12 incorrectly stated the law of obscenity; and (3) that the prosecutor's remarks to the jury, in particular his repeated references to the jurors as members of the community of Illinois, misled the jury and prejudiced its deliberation.

At defendant's trial Detective Steven D. Olson of the Rockford Police Department testified that at about 10 a.m., on July 21, 1983, he entered an adult book store at 519 W. State Street in Rockford. As he entered the book store, he was stopped by defendant who was behind the counter and who told the officer he would have to pay a 50¢ browsing fee. The officer related that within the book store there were numerous magazines, all depicting sexually explicit activities on both the front and back covers. Olson selected three magazines, brought them to the counter where defendant was located, and placed them face down. Defendant picked each magazine up, turned it over, looked at the price, and rang it up on the cash register. Later in the day, at approximately 2 p.m., the witness and other officers returned to the book store to arrest defendant.

The State's other witness was David B. MacMurchy, an officer assigned to the identification section of the Rockford police department. MacMurchy related that on the day of defendant's arrest the officer took photographs of the exterior and interior of the adult book store at 519 W. State Street. MacMurchy identified the photographs and described what each picture depicted.

Defendant's expert witness, Dr. Roderick Bell, presented testimony regarding a public opinion poll he con-

ducted which was designed to establish the attitude of adults living within the State of Illinois as to sexually explicit materials. Defendant's other witness, Phillip Lark, testified that he went to various adult book stores in different communities within the State of Illinois where he purchased sexually explicit magazines comparable to the materials involved in the defendant's trial.

During the State's closing argument, the prosecutor argued that the testimony of defendant's two witnesses was designed to show the jurors that because sexually explicit materials were available in other counties, this availability indicated such materials were acceptable in the State of Illinois. The prosecutor then stated:

> "I am telling you that simply because other counties in this State and bookstores in other counties in this State are allowed to operate and allowed to sell this type of material does not mean that we are going to allow them to be sold in Winnebago County."

Defendant's objection to the prosecutor's reference to "Winnebago County" was overruled.

At the jury instruction conference the State tendered the People's instruction No. 12 (Illinois Pattern Jury Instruction (IPI), Criminal, No. 9.57 (2d ed. 1981)) which gave a definition of "obscenity." This instruction was given over defendant's objection that it incorrectly stated the law regarding obscenity. Defendant's instructions Nos. 5 and 6 (non-IPI), which were refused, were claimed to set forth the tripartite test for obscenity under Illinois law and the application of community standards to that test.

The jury found the defendant, Charles D. Morrison, guilty of the crime of obscenity on all counts. The court

imposed a sentence of 12 months' conditional discharge and a fine of $1,500.

•1 Defendant's first contention is that the Illinois obscenity statute (Ill. Rev. Stat. 1983, ch. 38, par. 11—20) is unconstitutionally vague, indefinite, and uncertain. This issue and defendant's arguments are nearly identical to the first issue in *People v. Pope* (1985), 138 Ill. App. 3d 726, with which the instant case was consolidated for oral argument. We adopt our positions set forth in *Pope* on this first issue and refer the parties to our opinion in *Pope* for our discussion of this similar issue in which we conclude, as here, that the obscenity statute is constitutional.

•2, 3 Next, defendant contends that People's instruction No. 12 incorrectly stated the law of obscenity and, therefore, should not have been given. It is true that jury instructions should not be misleading or confusing *(People v. Gathings* (1981), 99 Ill. App. 3d 1135, 1138, 425 N.E.2d 1313), but jurors are properly instructed if all the instructions construed together, properly inform them of the applicable law. *(People v. Gerecke* (1977), 45 Ill. App. 3d 510, 517, 359 N.E.2d 1178.) Moreover, any confusion or ambiguity in an instruction may be cleared up by another instruction, as no single instruction is required to set forth all the relevant law on a single subject. *People v. Mills* (1968), 40 Ill. 2d 4, 15, 237 N.E.2d 697; *People v. Jones* (1975), 26 Ill. App. 3d 78, 85, 325 N.E.2d 56.

•4, 5 People's instruction No. 12 was taken from IPI Criminal 2d No. 9.57, and unless the trial court determines that a pattern instruction does not accurately state the law, that instruction should be used. (87 Ill. 2d R. 451(a); *People v. Haywood* (1980), 82 Ill. 2d 540, 545, 413 N.E.2d 410.)

Here, the instruction in dispute accurately stated the law regarding when material would be considered obscene. People's instruction No. 12 stated:

> "A thing is obscene if considered as a whole, its predominant appeal is to be prurient interest, that is, a shameful or morbid interest in nudity, sex, or excretion, *and,* it goes substantially beyond customary limits of candor in its description or representation of such matters; for example, by a patently offensive description or representation of ultimate sexual acts, normal or perverted, actual or simulated, or by a patently offensive description or representation of masturbation, excretory functions, or lewd exhibition of the genitals, *and,* it is utterly without redeeming social value.
>
> In determining whether a thing is obscene, you are to consider how it would be viewed by ordinary adults in the whole State of Illinois rather than by the people in any single city or town or region within the State." (Emphasis added.) (IPI Criminal 2d No. 9.57 (2d ed. 1981).)

As evident from the instruction itself, it informed the jurors that all three elements in the tripartite test for obscenity needed to be present in the material under review for the material to be deemed "obscene." *(Miller v. California* (1973), 413 U.S. 15, 25, 37 L. Ed. 2d 419, 431, 93 S. Ct. 2607, 2615; *People v. Ridens* (1974), 59 Ill. 2d 362, 373, 321 N.E.2d 264.) Thus, defendant's claim that the instruction did not so inform the jurors is without merit.

•6 We also find meritless defendant's claim that the pharse "for example" in People's instruction No. 12 improperly guided the jurors in their decision. Defendant appears to argue that the use of the phrase "for example" may have misguided the jurors into believing that conduct other than the examples set out in *Miller v. California*

could be considered obscene according to the Illinois obscenity statute (Il. Rev. Stat. 1983, ch. 38, par. 11—20) and that, therefore, this incorrect impression may have influenced the jurors' decision regarding the obscenity or nonobscenity of the magazines in question. However, a simple examination of the magazines clearly illustrates that they fell within the examples defined in *Miller* and, thus, we believe it was both unnecessary and unlikely that the jurors considered depictions not examplified by People's instruction No. 12.

•7 Additionally, defendant's complaint that the instruction omitted any reference to community standards is misplaced. Although People's instruction No. 12 does not utilize the terminology "community standard," the instruction clearly directed the jurors to determine how the magazines in question would be viewed by ordinary adults in the whole State and not just by people in a single city, town, or region. Therefore, we find instruction No. 12 distinguishable from those tendered in *People v. Will* (1975), 30 Ill. App. 3d 35, 332 N.E.2d 53, and *People v. Watson* (1975), 26 Ill. App. 3d 1081, 325 N.E.2d 629, upon which defendant relies in his reply brief. In *Will*, unlike the case at bar, "no reference to 'community standard' or any form thereof" (*People v. Will* (1975), 30 Ill. App. 3d 35, 36, 332 N.E.2d 53) was contained in the given instruction. In *Watson*, no statewide standard was mentioned in the instruction given nor was any other evidence presented by either party in regard to a contemporary statewide community standard. Here, People's instruction No. 12 defined the extent of the "community" by which the standard was to be measured and instructed the jury that it could not adopt a "community" lesser

than statewide. Moreover, the court also tendered to the jury defendant's instruction No. 1, which specifically stated that in determining the obscenity of the material in question the jurors were not to apply their own personal standards but rather the community standard for the State of Illinois.

•8 Finally, in arguing that People's instruction No. 12 was erroneously given, defendant argues that the obcenity definition in the instruction was improper because it allowed the jurors to apply a community standard instead of an objective one in determining whether the magazines were "utterly without redeeming social value." We choose to dismiss this argument by simply pointing out that the United States Supreme Court has never held that an objective standard as opposed to a communtiy one should be applied in adjudging if materials are "utterly without redeeming social value." On the facts of this case, we see no reason why we should hold otherwise.

•9 Defendant's last contention is that the prosecutor's references during his closing argument to the jurors as members of the "community" resulted in their using a personal standard, or a county standard, rather than a statewide standard in judging whether the materials in question were obscene. Specifically, defendant argues that the prosecutor's statements were purposefully directed towards misleading the jurors into thinking that they could judge the magazines in question entirely on a community standard of Winnebago County and on their own personal opinions. We do not read the prosecutor's remarks to be either misleading or prejudicial and believe defendant has misinterpreted them. Rather, we are of the

opinion that the correct interpretation is that advocated by the State, *i.e.*, that the prosecutor's references to Winnebago County were part of a valid argument based on evidence presented by defendant in the form of testimony by Phillip Lark regarding the availability of obscene materials in other counties and by Dr. Roderick Bell regarding the results of his survey of sexually explicit materials. We believe the prosecutor was indicating that despite the reluctance of other counties to prosecute those who sell sexually explicit materials, Winnebago County was not going to be equally reluctant. We do not perceive the prosecutor's remarks as an attempt to influence the jurors into applying what they considered to be the community standard of Winnebago County to the materials in question. Since a prosecutor may comment on the evidence presented and reasonable inferences that can be drawn therefrom *(People v. Fayson* (1985), 131 Ill. App. 3d 517, 523, 475, N.E.2d 945), we do not find the remarks in question improper.

•10 Moreover, even if the prosecutor's references to the community of Winnebago County and to the jurors as members of that community could be considered improper, they did not amount to reversible error. Subsequent to the prosecutor's closing statements, defense counsel in his closing comments stressed that the jury was not to judge the magazines by the jurors' personal standards. Rather, the jury was told to apply a "community standard" which meant a statewide standard and not a standard limited to the community of Winnebago County. Additionally, as pointed out above, People's instruction No. 12 and defendant's instruction No. 1 emphasized the fact that in determining if materials were obscene, the jurors

had to consider how the materials would be viewed by ordinary adults in the whole State of Illinois rather than by people in any single city, town, or region within the State. Thus, in our opinion the prosecutor's remarks did not prejudice defendant's conviction.

For the reasons set forth above, the judgment of the circuit court of Winnebago County is affirmed.

Affirmed.

STROUSE and UNVERZAGT, JJ., concur.

EXHIBIT C

State of Illinois
Appellate Court Second District
Elgin
60120

OFFICE OF THE CLERK
312-695-3750

Appeal from the Circuit Court of County of Winnebago

Trial Court Number: 83CM4116

THE COURT HAS THIS DAY, 12/31/85, ENTERED THE FOLLOWING ORDER IN THE CASE OF:

Gen. No.: 2-84-1067

People v. Pope, Richard

Petitions by defendant-appellant and plaintiff-appellee for rehearing denied.

LOREN J. STROTZ, Clerk

cc: Reno, O'Byrne & Kepley, P.C.
Glenn A. Stanko
J. Steven Beckett
Sreenan & Cain
Daniel Cain
Honorable Daniel Doyle
John X. Breslin
Terry A. Mertel
Phyllis J. Perko, Deputy Director

EXHIBIT D

State of Illinois
Appellate Court Second District
Elgin
60120

OFFICE OF THE CLERK
312-695-3750

Appeal from the Circuit Court of County of Winnebago

Trial Court Number: 83CM4114

THE COURT HAS THIS DAY, 12/31/85, ENTERED THE FOLLOWING ORDER IN THE CASE OF:

Gen. No.: 2-84-0623

People v. Morrison, Charles G.

Petition by defendant-appellant for rehearing denied.

LOREN J. STROTZ, Clerk

cc: Reno, O'Byrne & Kepley, P.C.
J. Steven Beckett
Glenn A. Stanko
Sreenan & Cain
Daniel Cain
Honorable Daniel Doyle
Phyllis J. Perko, Deputy Director
John X. Breslin
Terry A. Mertel

EXHIBIT E

63044

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

April 2, 1986

[
Mr. Glenn A. Stanko
Reno, O'Byrne & Kepley
501 West Church St.
Champaign, Ill 61820
[

No. 63044 — People State of Illinois, respondent v. Richard Pope, petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 24, 1986.

EXHIBIT F

63064

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Il. 62706
(217) 782-2035

April 2, 1986

[
Mr. Glenn A. Stanko
Reno, O'Byrne & Kepley
501 West Church St.
Champaign, Ill 61820
[

No. 63064 — People State of Illinois, respondent, v. Charles G. Morrison, petitioner. Leave to appeal, Appellate Court Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 24, 1986.

EXHIBIT G

First Amendment
Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment
Constitution of the United States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

EXHIBIT H

11-20. Obscenity

§ 11-20. Obscenity. (a) Elements of the Offense.

A person commits obscenity when, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other represenation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Performs an obscene act or otherwise presents an obscene exhibition of his body for gain; or

(5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or

(6) Advertises or otherwise promotes the sale of material represented or held out by him to be obscene, whether or not it is obscene.

(b) Obscene Defined.

A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is

obscene even though the obscenity is latent, as in the case of undeveloped photographs.

(c) Interpretation of Evidence.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that material is being commercially exploited for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

In any prosecution for an offense under this Section evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;

(2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect if any, it would probably have on the behavior of such people;

(3) The artistic, literary, scientific, educational or other merits of the material, or absence thereof;

(4) The degree, if any, of public acceptance of the material in this State;

(5) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

(6) Purpose of the author, creator, publisher or disseminator.

(d) Sentence.

Obscenity is a Class A misdemeanor. A second or subsequent offense is a Class 4 felony.

(e) Prima Facie Evidence.

The creation, purchase, procurement or possession of a mold, engraved plate or other embodiment of obscenity specially adapted for reproducing multiple copies, or the possession of more than 3 copies of obscene material shall be prima facie evidence of an intent to disseminate.

(f) Affirmative Defenses.

It shall be an affirmative defense to obscenity that the dissemination:

(1) Was not for gain and was made to personal associates other than children under 18 years of age;

(2) Was to institutions or individuals having scientific or other special justification for possession of such material.

Amended by P.A. 77-2638, § 1, eff. Jan. 1, 1973.

FILED
JUN 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD POPE and CHARLES G. MORRISON,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second District

RESPONDENT'S BRIEF IN OPPOSITION

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Printed by Authority of the State of Illinois (P.O. 33289—50—6-27-86)

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Illinois Obscenity Statute is constitutionally infirm under the First and Fourteenth Amendments to the United States Constitution in light of this Court's decision in *Brockett v. Spokane Arcades, Inc.*, ___ U.S. ___, 105 S.Ct. 2794 (1985).

2. Whether petitioner raises an issue worthy of this Court's attention when he incorrectly asserts that an objective standard be used in the application of the third prong of the *Miller v. California* test for obscenity.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW ..	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
PRAYER	1
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF FACTS	3
REASONS FOR DENYING THE WRIT:	
I.	
THIS COURT HAS ALREADY UPHELD THE ILLINOIS OBSCENITY STATUTE AS CONSTITUTIONAL	4
A.	
This Court's Decision In *Brockett v. Spokane Arcades, Inc.*, ____ U.S. ____, 105 S.Ct. 2794 (1985) Has No Effect On The Constitutionality Of The Illinois Obscenity Statute	4
B.	
The Evidentiary Section Is Consistent And Unambiguous	6
II.	
STATES ENJOY THE RIGHT TO CHOOSE THE APPROPRIATE STANDARD TO BE APPLIED TO THE THIRD PRONG OF THE *MILLER* TEST FOR OBSCENITY	8
CONCLUSION	10

APPENDIX

A— United States Constitution, First Amendment and Fourteenth Amendment ..... App. 1

B— Illinois Obscenity Statute, Ill. Rev. Stat. 1983, ch. 38, ¶11-20 ..... App. 2

C— Illinois Obscenity Statute, Ill. Rev. Stat. 1986, ch. 38, ¶11-20 ..... App. 5

TABLE OF AUTHORITIES

CASES PAGE

Brockett v. Spokane Arcades, Inc., ____ U.S. ____, 105 S.Ct. 2794 (1985) 4, 5

Eagle Books v. Reinhard, 418 F.Supp. 345 (N.D. Ill. 1976) 4

Memoirs v. Massachusetts, 383 U.S. 413 (1966) .. 9

Miller v. California, 413 U.S. 15 (1973) 8, 9

Penthouse International, Ltd. v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980) 9

People v. Brocic, 80 Ill. App. 2d 65, 224 N.E.2d 572 (1967) 7

People v. Gould, 60 Ill.2d 159, 324 N.E.2d 412 (1975) 4, 6

People v. Nelson, 88 Ill. App. 3d 196, 410 N.E.2d 476 (1980) 7

People v. Ridens, 59 Ill.2d 362, 321 N.E.2d 264 (1974) 4, 9

People v. Sikora, 32 Ill.2d 260, 204 N.E.2d 768 (1965) 4

State v. Princess Cinema of Milwaukee, Inc., 96 Wis.2d 646, 292 N.W.2d 807 (1980) 9

United States v. Bagnell, 679 F.2d 826 (11th Cir. 1982) 9

United States v. Heyman, 562 F.2d 316 (4th Cir. 1977) 9

Ward v. Illinois, 431 U.S. 767 (1977) 4, 5, 9

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, First Amendment ... 2

United States Constitution, Fourteenth Amendment 2

Ill. Rev. Stat. 1983, ch. 38, ¶11-20 ..... 2, 4, 6, 7

Wash. Rev. Cod. §7.48A.010(8) (1983) 5

ANNOTATIONS

Smith Hurd Illinois Annotated Statutes, ch. 38, §11-20 7

No. 85-1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD POPE and CHARLES G. MORRISON,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second District

RESPONDENT'S BRIEF IN OPPOSITION

PRAYER

The respondent asks this Court to deny the petition for writ of certiorari to review the judgments and opinions of the Appellate Court of the State of Illinois, Second District, entered on November 26, 1985.

OPINIONS BELOW

The petitioner seeks review from an Illinois Appellate Court, Second District, opinion in *People v. Pope*, reported at 138 Ill. App. 3d 726, 486 N.E.2d 350 (1985). The petitioner seeks review from an Illinois Appellate Court, Second District, opinion in *People v. Morrison*, reported at 138 Ill. App. 595, 486 N.E.2d 345 (1985). Copies of these opinions are included with petitioners' petition. The petitioners' petition for leave to appeal to the Illinois Supreme Court was denied on April 2, 1986.

JURISDICTION

The jurisdictional requirements are adequately set forth in the Petition. As treated more fully in the argument contained herein, however, petitioners have not shown grounds for this Court to exercise its sound discretion to grant the Petition for Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the First and Fourteenth Amendments to the United States Constitution and the Illinois Obscenity Statute, Ill. Rev. Stat. 1983, ch. 38, ¶11-20 are set forth in Appendix A and B. The most recent revision of the Illinois Obscenity Statute, which became effective January 1, 1986, is set forth in Appendix C.

STATEMENT OF FACTS

Petitioners were clerks in two different adult bookstores. Each was charged with three counts of obscenity arising out of the sale of obscene magazines. After separate jury trials, each petitioner was convicted on all three counts.

Motions to dismiss were filed in both cases asserting that the Illinois Obscenity Statute is unconstitutionally vague and overbroad and therefore in violation of petitioners' rights under the First and Fourteenth Amendments to the Constitution of the United States. Additionally, petitioners argued that the Illinois Obscenity Statute is constitutionally infirm for failing to require that an objective standard be applied to the third part of the *Miller* Test for Obscenity. These motions were denied.

On appeal, the cases were consolidated for oral argument in the Appellate Court for the State of Illinois, Second District. The Appellate Court also rejected petitioners' constitutional arguments. Petitions for leave to appeal were filed, and denied by the Illinois Supreme Court.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS ALREADY UPHELD THE ILLINOIS OBSCENITY STATUTE AS CONSTITUTIONAL.

A.

This Court's Decision In *Brockett v. Spokane Arcades, Inc.*, ____ U.S. ____, 105 S.Ct. 2794 (1985) Has No Effect On The Constitutionality Of The Illinois Obscenity Statute.

No warrantable concerns compel this Court to exercise its discretionary jurisdiction to review the decision below. This Court, as well as the Illinois courts, have reviewed and rejected constitutional attacks on any alleged overbroad construction of the Illinois Obscenity Statute as contained in ch. 38, ¶11-20(b) of the Illinois Revised Statutes. See *Ward v. Illinois*, 431 U.S. 767 (1977); *Eagle Books v. Reinhard*, 418 F. Supp. 345 (N.D. Ill. 1976). See generally *People v. Sikora*, 32 Ill.2d 260, 204 N.E.2d 768 (1965); *People v. Gould*, 60 Ill.2d 159, 324 N.E.2d 412 (1975); *People v. Ridens*, 59 Ill.2d 362, 321 N.E.2d 264 (1974).

In *Ward v. Illinois*, 431 U.S. 767 (1977), this Court examined the Illinois Obscenity Statute and held that it is neither vague nor overbroad. The Court cited the Illinois Supreme Court decision in *People v. Sikora*, 32 Ill.2d 260, 204 N.E.2d 768 (1965), and concluded that the construction of the statute gives detailed meaning to the Illinois law and is not vague. *Ward, supra* at 772. Additionally, this Court went on to hold that the statute is not overbroad nor open-ended and is not vulnerable to attack in this respect. Moreover, the Illinois courts, in interpreting the statute, have been aware of the need for specificity,

and have properly comported with the *Miller* test for obscenity. *Ward, id.* at 775-776.

Petitioner claims that with this Court's recent decision in *Brockett v. Spokane Arcades, Inc.*, ____ U.S. ____, 105 S.Ct. 2794 (1985), the Illinois obscenity statute can now be considered constitutionally infirm as it is overbroad and proscribes materials appealing to a normal healthy interest in sex. Petitioners' assertion is feeble to say the least.

In *Brockett*, this Court found that the definition of obscenity, as contained in a Washington statute, was overbroad in that the word "prurient", which is common to most obscenity statutes, was defined as "that which incites lasciviousness or lust". Wash. Rev. Cod. §7.48A.010(8) (1983). The United States Court of Appeals struck down the statute in its entirety as such a definition would allow the statute to reach constitutionally protected material that stimulated normal sexual response. This Court reversed that decision, holding that the statute was infirm only insofar as the use of the word "lust" in the statute was concerned. This Court held that the lower court could merely have exercised the word "lust", as it refers to normal interests in sex. "Lasciviousness" is proper as it would mean a shameful or morbid interest in sex. See *Brockett, supra*, pp. 2802-2803.

Petitioners maintain the analogy that as in the Washington statute, the Illinois statute is unconstitutional in that its definition of "prurient" is ambiguous, and that an evidentiary rule contained in section (c)(2) of the same statute allows proscription of materials relating to a normal, healthy interest in sex.

This analogy, which appears in section 1 of petitioners' petition and constitutes the bulk of their brief, is completely without merit. First, the statute as it appeared

in 1983 was clear and concise in its definition of "prurient". It left no room to proscribe materials relating to normal, healthy interests in sex. The word "lust" is not even evident in the Illinois statute as it was in the Washington statute. Moreover, the word "prurient" is very specifically defined as "a shameful morbid interest in nudity, sex, or excretion; going substantially beyond the customary limits of candor in description or representation of such matters." Ill. Rev. Stat., ch. 38, ¶11-20(b). These words in and of themselves clearly indicate that materials illiciting a normal healthy interest in sex are not to be reached, and are plainly consistent with this Court's holding in *Brockett*.

Petitioners claim that the Illinois Supreme Court decision in *People v. Gould*, 60 Ill.2d 159, 324 N.E.2d 412 (1975), is a good illustration of how the Illinois statute can proscribe constitutionally protected material. Respondent fails to see any validity to the claim. Petitioners assert that the photos reviewed by the Court in *Gould* were not "hard core" and of the genre of photos depicted in Playboy and Penthouse magazines. Respondent assumes that petitioner alleges that photos in these magazines would be constitutionally protected. The court, in *Gould*, gives an ample description of the materials on pages 413 and 415 and renders a very clear opinion as to the nature of the obscenity. Petitioners' attempt to categorize the materials reviewed in *Gould* as not being "hard core", and therefore appealing to the normal sexual interest, is based on mere conjecture.

B.

The Evidentiary Section Is Consistent And Unambiguous.

Petitioners also allege that the evidentiary clause contained in the statute lends to the ambiguity and is incon-

sistent with the definition of "prurient". It appears that petitioners completely misinterpret the application of the clause. The evidentiary section is clear and concise. Upon examination, any reasonable individual could readily determine that it has absolutely nothing to do with the section set up to define "prurient".

The evidentiary section states the following:

> In any prosecution for an offense under this Section evidence shall be admissible to show:
>
> * * *
>
> What the predominant appeal of the material would be for ordinary adults or a special audience and what effect if any, it would probably have on the behavior of such people . . . Ill. Rev. Stat. 1983, ch. 38, ¶11-20(c)(2).

This clause does not provide an exclusive test of the types of evidence which may be admissible as bearing on the question of obscenity. These provisions are only listed to serve as a guide and deter a trial court from holding every one of the types to be inadmissible in a proper case. S.H.A. Ill. Stats. Anno. ch. 38, §11-20, p. 371. They allow the defendant the right to introduce the best evidence he can gather on the issue, so that the trier of fact can discern the state standard for obscenity and judge the questioned material accordingly. This evidentiary rule helps to deter the imposition of personal standards. See *People v. Nelson*, 88 Ill. App. 3d 196, 410 N.E.2d 476, 479 (1980); *People v. Brocic*, 80 Ill. App. 2d 65, 224 N.E. 2d 572, 576 (1967).

In short, this Court has already declared that the Illinois statute on obscenity is constitutional. The statute is neither vague, overbroad, ambiguous, nor inconsistent. Moreover, the *Brockett* decision does not render the statute open to further attack.

II.

STATES ENJOY THE RIGHT TO CHOOSE THE APPROPRIATE STANDARD TO BE APPLIED TO THE THIRD PRONG OF THE *MILLER* TEST FOR OBSCENITY.

Petitioners' second allegation is that the Illinois Obscenity Statute fails to require the use of an objective standard when applying the third part of the "*Miller* Test" for obscenity.

The basic guidelines for the trier of fact as set forth in *Miller* must be:

> (a) Whether the average person, applying contemporary community standards would find the work taken as a whole, appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24, 25 (1973).

An examination of the *Miller* opinion reveals this Court's awareness of the potential for confusion by mandating objective standards. "Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable 'national standards' when attempting to determine whether certain materials are obscene as a matter of fact. . . . It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City." *Miller, supra* at 31-32. "To require a state to structure obscenity proceedings around evidence of a national community standard would be an exercise in futility." *Miller, id.* at 30.

The third prong of the *Miller* test merely sets forth a minimum requirement for the determination of obscenity. *Id.* at 26. With regard to this prong of the test, each state has been allowed to choose the point, at or above which, prurient material loses constitutional protection. As its minimum requirement, Illinois has chosen the "utterly without redeeming social value" standard of *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), in preference to the more relaxed criterion contained in part (c) of the *Miller* guidelines. See *People v. Ridens*, 59 Ill.2d 362, 321 N.E.2d 264 (1974); *Ward v. Illinois*, 431 U.S. 774 (1977).

It is not the function of this Court to propose regulatory schemes for the states. *Miller* at 25. Petitioner cites *United States v. Heyman*, 562 F.2d 316 (4th Cir. 1977); *Penthouse International, Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980); *United States v. Bagnell*, 679 F.2d 826 (11th Cir. 1982); and *State v. Princess Cinema of Milwaukee, Inc.*, 96 Wis.2d 646, 292 N.W.2d 807 (1980), four isolated instances in which three federal courts and one state court ruled that it was error for the court to instruct that a subjective standard be used in determining part (c) of the test. These cases are immaterial. All of these courts, in accordance with *Miller*, acknowledge the states' right to choose the standard.

In the instant case, the Illinois Appellate Court opinions do not set forth an in depth analysis with respect to the use of specific standards as applied to part (c) of the *Miller* test. In rendering their decisions, these courts followed, as they must, their own state Supreme Court rulings, all of which are in compliance with this Court's rulings in *Ward v. Illinois*, 431 U.S. 767 (1977), and *Miller v. California*, 413 U.S. 15 (1973). Thus, there is no inconsistency within the Illinois courts and no inconsisten-

cy between Illinois' rulings and this Court's decisions on obscenity.

Because this Court was purposeful in not mandating application of a specific standard to the third prong of the *Miller* test, and because Illinois rulings on obscenity are consistent and in compliance with this Court's decisions on obscenity, this case does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, the respondent requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX A

First Amendment
Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment
Constitution of the United States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

Illinois Obscenity Statute,
Ill. Rev. Stat. 1983, ch. 38, ¶11-20

11-20. Obscenity

§ 11-20. Obscenity. (a) Elements of the Offense.

A person commits obscenity when, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other rep esentation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Performs an obscene act or otherwise presents an obscene exhibition of his body for gain; or

(5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or

(6) Advertises or otherwise promotes the sale of material represented or held out by him to be obscene, whether or not it is obscene.

(b) Obscene Defined.

A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes

substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs.

(c) Interpretation of Evidence.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that material is being commercially exploited for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

In any prosecution for an offense under this Section evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;

(2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect if any, it would probably have on the behavior of such people;

(3) The artistic, literary, scientific, educational or other merits of the material, or absence thereof;

(4) The degree, if any, of public acceptance of the material in this State;

(5) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

(6) Purpose of the author, creator, publisher or disseminator.

(d) Sentence.

Obscenity is a Class A misdemeanor. A second or subsequent offense is a Class 4 felony.

(e) Prima Facie Evidence.

The creation, purchase, procurement or possession of a mold, engraved plate or other embodiment of obscenity specially adapted for reproducing multiple copies, or the possession of more than 3 copies of obscene material shall be prima facie evidence of an intent to disseminate.

(f) Affirmative Defenses.

It shall be an affirmative defense to obscenity that the dissemination:

(1) Was not for gain and was made to personal associates other than children under 18 years of age;

(2) Was to institutions or individuals having scientific or other special justification for possession of such material.

Amended by P.A. 77-2638, § 1, eff. Jan. 1, 1973.

APPENDIX C

Illinois Obscenity Statute,
Ill. Rev. Stat. 1986, ch. 38, ¶11-20

11-20. Obscenity

§ 11-20. Obscenity. (a) Elements of the Offense. A person commits obscenity when, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Performs an obscene act or otherwise presents an obscene exhibition of his body for gain; or

(5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or

(6) Advertises or otherwise promotes the sale of material represented or held out by him to be obscene, whether or not it is obscene.

(b) Obscene Defined.

Any material or performance is obscene if: (1) the average person, applying contemporary adult community standards, would find that, taken as a whole, it appeals to the prurient interest; and (2) the average person, ap-

plying contemporary adult community standards, would find that it depicts or describes, in a patently offensive way, ultimate sexual acts or sadomasochistic sexual acts, whether normal or perverted, actual or simulated, or masturbation, excretory functions or lewd exhibition of the genitals; and (3) taken as a whole, it lacks serious literary, artistic, political or scientific value.

(c) Interpretation of Evidence.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that material is being commercially exploited for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is lacking in serious literary, artistic, political or scientific value.

In any prosecution for an offense under this Section evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;

(2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect if any, it would probably have on the behavior of such people;

(3) The artistic, literary, scientific, educational or other merits of the material, or absence thereof;

(4) The degree, if any, of public acceptance of the material in this State;

(5) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

(6) Purpose of the author, creator, publisher or disseminator.

(d) Sentence.

Obscenity is a Class A misdemeanor. A second or subsequent offense is a Class 4 felony.

(e) Prima Facie Evidence.

The creation, purchase, procurement or possession of a mold, engraved plate or other embodiment of obscenity specially adapted for reproducing multiple copies, or the possession of more than 3 copies of obscene material shall be prima facie evidence of an intent to disseminate.

(f) Affirmative Defenses.

It shall be an affirmative defense to obscenity that the dissemination:

(1) Was not for gain and was made to personal associates other than children under 18 years of age;

(2) Was to institutions or individuals having scientific or other special justification for possession of such material.

Amended by P.A. 84-709, § 1, eff. Jan. 1, 1986.

P.A. 84-709 rewrote the definition of obscenity which prior thereto read:

"A thing is obscene if considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs.";

And in the second paragraph of subd. (c), substituted "lacking in serious literary, artistic, political or scientific value" for "utterly without redeeming social importance".

Supreme Court, U.S.
FILED
NOV 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-1973

In The

Supreme Court of the United States

October Term, 1986

RICHARD POPE and
CHARLES G. MORRISON,
Petitioners,

vs.

STATE OF ILLINOIS,
Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

JOINT APPENDIX

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Petition for Certiorari filed May 30, 1986
Certiorari Granted October 6, 1986

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33pp

TABLE OF CONTENTS

	Page
Notation Regarding Items Already Reproduced	ii
Relevant Docket Entries (Morrison)	1
Relevant Docket Entries (Pope)	2
Amended Information (Morrison)	4
Motion to Dismiss (Morrison)	6
People's Instruction No. 12 (Morrison)	11
Defendant's Instruction No. 1 (Morrison)	12
Defendant's Instruction No. 5 (Morrison)	13
Defendant's Instruction No. 6 (Morrison)	14
Post-Trial Motion for Judgment of Acquittal Notwithstanding the Verdict or, in the Alternative, for a New Trial (Morrison)	15
Information, as Amended (Pope)	18
Motion to Dismiss (Pope)	20
Defendant's Instruction No. 2 (Pope)	25
Post-Trial Motion for Judgment of Acquittal Notwithstanding the Verdict or, in the Alternative, for a New Trial (Pope)	27

NOTATION REGARDING ITEMS ALREADY REPRODUCED

The following opinions and statutes have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Opinion of the Second District Appellate Court for the State of Illinois in *People v. Pope*, dated November 26, 1985 ..... App. 1

Opinion of the Second District Appellate Court for the state of Illinois in *People v. Morrison*, dated November 26, 1985 ..... App. 25

Illinois Obscenity Statute, Ill.Rev.Stat. 1983, ch. 38, ¶ 11-20 ..... App. 39

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT

WINNEBAGO COUNTY, ILLINOIS

NO. 83 CM 4114

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

vs.

CHARLES G. MORRISON,

Defendant.

RELEVANT DOCKET ENTRIES

September 28, 1983—Motion to Dismiss filed

January 31, 1984 —Motion to Dismiss heard and continued to February 6, 1984, at 9:30 a.m. for decision

April 3, 1984 —* * * Trial Proceeds. * * * Jury Instructions given to jury. Jury retires. Jury returns verdict finding the defendant, Charles G. Morrison, guilty of Count I Obscenity, guilty of Count II Obscenity, and guilty of Count III Obscenity in the manner and form as charged in the complaint.

May 3, 1984 —Post-Trial Motion for Judgment of Acquittal Notwithstanding the Verdict or, in the Alternative, for a New Trial filed.

June 4, 1984 —* * * Defendant's Motion (Post-Trial) to dismiss conviction, heard and denied. Conviction on verdict of jury stands. * * *

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT
WINNEBAGO COUNTY, ILLINOIS

NO. 83 CM 4116

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff

vs.

RICHARD POPE,
Defendant.

RELEVANT DOCKET ENTRIES

September 28, 1983—Motion to Dismiss filed.

January 31, 1984 —Motion to Dismiss heard and continued to February 6, 1984, at 9:30 a.m. for decision.

September 10, 1984—* * * Defendant's oral motion to dismiss heard and denied. * * *

September 11, 1984—* * * Trial Proceeds. Motion by defendant for directed verdict at close of State's evidence heard and denied. Trial proceeds. Motion by defendant for directed verdict at close of all evidence heard and denied. Jury retires. Jury returns verdict finding the defendant, Richard Pope, guilty of Count I, Obscenity, guilty of Count II, Obscenity and guilty of Count III, Obscenity in the manner and form as charged in the amended information.

September 25, 1984—* * * Judgment of conviction entered.

October 4, 1984 —Post-Trial Motion for Judgment of Acquittal Notwithstanding the Verdict or, in the Alternative, for a New Trial filed.

October 15, 1984 —* * * Post-Trial Motion for Judgment of Acquittal Notwithstanding the Verdict or, in the Alternative, for a New Trial heard and denied.

* * *

State of Illinois

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
County of Winnebago

No. 83CM4114

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

CHARLES G. MORRISON

Defendant

AMENDED INFORMATION

(Filed March 19, 1984)

The State's Attorney of said County charges:

COUNT I

That on the 21st day of July, 1983, County of Winnebago and State of Illinois, CHARLES G. MORRISON committed the offense of Obscenity, in that he, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, sold a certain Obscene magazine, entitled Solo Suck Off, in violation of Paragraph 11-20 (a) (1), Chapter 38, Illinois Revised Statutes.

COUNT II

That on the 21st day of July, 1983, County of Winnebago and State of Illinois, Charles G. Morrison committed the offense of Obscenity, in that he, with knowledge of the nature or content thereof, or recklessly failing to exercise

reasonable inspection which would have disclosed the nature or content thereof, sold a certain obscene magazine, entitled Rubber Suckers, in violation of Paragraph 11-20 (a) (1), Chapter 38, Illinois Revised Statutes, and further,

COUNT III

That on the 21st day of July, 1983 in the County of Winnebago and State of Illinois, Charles G. Morrison committed the offense of Obscenity, in that he, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, sold a certain obscene magazine, entitled She-Male Subjugation, in violation of Paragraph 11-20 (a) (1), Chapter 38, Illinois Revised Statutes.

(Affidavit and bail setting omitted in printing)

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT

WINNEBAGO COUNTY, ILLINOIS

No. 83-CM-4114

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

v.

CHARLES GARY MORRISON,

Defendant.

MOTION TO DISMISS

(Filed September 28, 1983)

NOW COMES the defendant, CHARLES GARY MORRISON, by his attorney, J. STEVEN BECKETT of RENO, O'BYRNE & KEPLEY, and for his motion to dismiss the information herein, and in support thereof, alleges and states as follows:

1. That the information is legally insufficient and violates the defendant's rights to proper notice under the First and Fourteenth Amendments to the Constitution of the United States, and under Chapter 38, § 111-3, Ill.Rev. Stat., in that said information fails to allege the necessary material elements of the legal definition of obscenity.

2. That the information and statute under which it is brought, namely Ill.Rev.Stat., Ch. 38, ¶11-20, are so vague, indefinite, uncertain and overbroad so as to fail to give guidance as to the conduct to be proscribed, in violation of the defendant's rights under the First and Fourteenth

Amendments to the Constitution of the United States. Further, that the history of the statute upon which the information is based is as follows:

(a) Said statute was enacted in its present form in 1961;

(b) Said statute has been judicially construed multiple times without further legislative revision, including the following:

(i) The third element of the tripartite test under *Memoirs v. Massachusetts*, 383 U.S. 415, 86 S.Ct. 975 (1966), "utterly without redeeming social value", was added by judicial construction. *People v. Ridens* (*Ridens I*), 51 Ill.2d 410, 282 N.E.2d 691 (1972), vacated and remanded as *Ridens v. Illinois*, 413 U.S. 912, 93 S.Ct. 3046 (1973); *People v. Thomas*, 37 Ill.App.3d 320, 346 N.E.2d 190 (1976); *People v. Stromblad*, 55 Ill.App.3d 511, 370 N.E.2d 1181 (1977).

(ii) A statewide "community standard" has been imposed by judicial construction. *People v. Price*, 8 Ill.App.3d 158, 289 N.E.2d 280 (1972); *People v. Ridens* (*Ridens II*), 59 Ill.2d 362, 321 N.E.2d 264 (1974), cert. denied, 421 U.S. 993, 95 S.Ct. 2000 (1975); *Eagle Books v. City of Rockford*, 66 Ill.App.3d 1038, 384 N.E.2d 493 (1978).

(iii) That part (b) of the tripartite test of *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607 (1973), including the explanatory examples (a) and (b), have been judicially engrafted onto the statute in *Ward v. Illinois*, 431 U.S. 767, 97 S.Ct. 2085 (1977).

(c) That unless judicially construed otherwise, the statute is unconstitutional in the following respects:

(i) It allows the trier of fact to consider the effect of materials on children as part of the relevant community, Chapter 38, ¶11-20(c), in violation of principles announced in *Pinkus v. United States*, 436 U.S. 293, 98 S.Ct. 1808 (1978).

(ii) It fails to require that the element of "utterly without redeeming social value" be adjudged solely on an objective basis as opposed to reference to contemporary community standards. *Smith v. United States*, 431 U.S. 291, 97 S.Ct. 1756 (1977), *United States v. Heyman*, 562 F.2d 316 (4th Cir., 1977), and *State v. Princess Cinema of Milwaukee, Inc.*, — Wis. —, 292 N.W.2d 807 (1980).

(iii) It fails to allow an affirmative defense for a dissemination to all adults instead of certain special classifications of persons (Ch. 38, ¶11-20 (f)(2)). *People v. Wrench*, 83 Misc.2d 95, 371 N.Y.S.2d 833 (1975).

3. That the Illinois Obscenity Statute, as written and as judicially construed, is unconstitutionally vague, indefi-

nite, uncertain, overbroad, and fails to give guidance as to the conduct prescribed, all in violation of the defendant's rights under the First and Fourteenth Amendments to the Constitution of the United States; in addition, further judicial construction of said statute in an attempt to save the statute should be declined. *State v. Princess Cinema of Milwaukee, Inc.*, — Wis. —, 292 N.W.2d 807 (1980).

4. That the standards set forth by the United States Supreme Court with respect to state obscenity statutes, as utilized by the Illinois Supreme Court with respect to Chapter 38, ¶11-20, Illinois Revised Statutes, are so vague, indefinite, uncertain and overbroad that said standards violate defendant's rights to notice under the First and Fourteenth Amendments to the Constitution of the United States. *Ward v. Illinois*, 431 U.S. 767, 777, 97 S.Ct. 2085, 2091 (1977).

5. That there exists no compelling governmental interest to constitutionally permit prosecution for the communication of ideas via speech and press regarding sexual matters, thereby rendering the said Illinois Obscenity Statute, Chapter 38, ¶11-20, Illinois Revised Statutes (1981), unconstitutional.

6. That the material in question under the information, namely the magazines entitled "Solo Suckoff", "Rubber Suckers", and "She-Male Subjugation" may not be criminally proscribed and are protected by the First Amendment to the Constitution of the United States as a matter of law; further, that the court is required to make an independent judicial review under principles announced in *Jenkins v. Georgia*, 418 U.S. 153, 94 S.Ct. 2750 (1974), *People v. Ridens*, 59 Ill.2d 362, 321 N.E.2d 264 (1974), and *People v. Ward*, 63 Ill.2d 437, 349 N.E.2d 47 (1976).

7. That the materials which form the basis of the charge herein were only made available to consenting adults and were not foisted on unconsenting adults or made available to minors; further, that prosecution for sale or distribution of the materials in this context violates the right of privacy guaranteed by the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments to the Constitution of the United States and the penumbra of the Bill of Rights.

WHEREFORE, the defendant, CHARLES GARY MORRISON, prays that the court would make an independent constitutional determination of the obscenity *vel non* of the materials that are the subject of this charge and, further, that the information against him be dismissed and that the Illinois Obscenity Statute, Ch. 38, ¶11-20, be declared unconstitutional for one or more of the aforementioned reasons.

CHARLES GARY MORRISON,
Defendant
/s/ J. Steven Beckett
His Attorney

J. STEVEN BECKETT
RENO, O'BYRNE & KEPLEY
P.O. BOX 693
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ROCKFORD, IL 61101

(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT

WINNEBAGO COUNTY, ILLINOIS

NO. 83 CM 4114

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

vs.

CHARLES G. MORRISON,

Defendant.

PEOPLE'S INSTRUCTION NO. 12

A thing is obscene if considered as a whole, its predominant appeal is to a prurient interest, that is, a shameful or morbid interest in nudity, sex, or excretion, and, it goes substantially beyond customary limits of candor in its description or representation of such matters; for example, by a patently offensive description or representation of ultimate sexual acts, normal or perverted, actual or simulated, or by a patently offensive description or representation of masturbation, excretory functions, or lewd exhibition of the genitals, and, it is utterly without redeeming social value.

In determining whether a thing is obscene, you are to consider how it would be viewed by ordinary adults in the whole State of Illinois rather than by the people in any single city or town or region within the State.

IPI No. 9.57

People's Instruction No. 12

(Given over objection)

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT

WINNEBAGO COUNTY, ILLINOIS

NO. 83 CM 4114

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

vs.

CHARLES G. MORRISON,

Defendant.

DEFENDANT'S INSTRUCTION NO. 1

You must not judge this material by your own personal standards, even if you are personally offended by the material; rather, your verdict must be based on the evidence and testimony presented in this case, and your determination of what the community standards for the State of Illinois with respect to the obscenity or non-obscenity of the material are.

Defendant's Instruction No. 1

Not I.P.I.

Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887 (1974)

(Given over objection)

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT

WINNEBAGO COUNTY, ILLINOIS

NO. 83 CM 4114

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff.

vs.

CHARLES G. MORRISON,

Defendant.

DEFENDANT'S INSTRUCTION NO. 5

A thing is obscene if:

(1) considered as a whole, applying contemporary community standards, its predominate appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex, or excretion; and

(2) it is patently offensive to contemporary community standards in its description and representation of sexual matters; and

(3) it is utterly without redeeming social value.

All three elements must exist in each magazine before you can find that each is obscene. If you do not find that the elements described above in subparagraphs 1, 2 and 3 all exist in each magazine, then that magazine may not be found to be obscene.

Defendant's Instruction No. 5
I.P.I. 9.57 (Modified)

(Refused)

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT

WINNEBAGO COUNTY, ILLINOIS

NO. 83 CM 4114

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

vs.

CHARLES G. MORRISON,

Defendant.

DEFENDANT'S INSTRUCTION NO. 6

The court instructs the jury that in order to find material obscene the jury must conclude that the average adult, applying contemporary community standards, would find the material is obscene. Under Illinois law, a statewide standard must be used in making this determination. These contemporary community standards are to be utilized on only the first two parts of the tripartite test for obscenity and not on the question of whether the material is utterly without redeeming social value.

Defendant's Instruction No. 6

Not I.P.I.

People v. Ridens, 59 Ill.2d 362, 321 N.E.2d 264 (1974);
People v. Butler, 49 Ill.2d 435, 275 N.E.2d 400 (1971);
State of Wisconsin v. Princess Cinema, — Wis. —, 292 N.W.2d 807 (1980).

(Refused)

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT

WINNEBAGO COUNTY, ILLINOIS

No. 83-CM-4114

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff.

vs.

CHARLES G. MORRISON,

Defendant.

POST-TRIAL MOTION FOR JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

(Filed May 3, 1984)

NOW COMES the defendant, CHARLES G. MORRISON, by his attorney, J. STEVEN BECKETT of RENO, O'BYRNE & KEPLEY, and for his post-trial motion for a judgment of acquittal ntowithstanding the verdict of guilty returned by the jury in the above-mentioned cause, or in the alternative, for a new trial, and in support thereof alleges and states as follows:

1. That the trial court erred in denying the defendant's motion to dismiss and all of its included allegations regarding the amended information, the Illinois Obscenity Statute, and the communicative materials on trial, in violation of the defendant's rights under the First and Fourteenth Amendments to the Constitution of the United States.

2. That the trial court erred in allowing into evidence, over the defendant's objection, testimony of Officer

Olsen regarding statements and conduct of the defendant after he had been placed under arrest and was in custody with free movement restrained, which said statements and conduct were obtained in violation of the defendant's right against self-incrimination under the Fifth and Fourteenth Amendments to the Constitution of the United States.

3. That the trial court erred in giving People's Instruction No. 12 and in refusing Defendant's tendered instruction No. 5. and thus improperly instructed the jury on the correct nature and application of the tripartite test of obscenity under Illinois law, in violation of the defendant's rights under the First and Fourteenth Amendments to the Constitution of the United States.

4. That the trial court erred in refusing defendant's tendered instruction No. 7 which correctly recited the necessary and applicable principles of law of obscenity where a defendant adduces evidence regarding community standards, in violation of defendant's rights under the First and Fourteenth Amendments to the Constitution of the United States.

5. That the state failed to meet its burden of proof beyond a reasonable doubt to adduce testimony demonstrating the materials on trial offended contemporary community standards for the State of Illinois when, during voir dire, the jury conclusively established that it would be unable to ascertain such a standard without evidentiary assistance, and in the face of testimony adduced by the defendant that the materials did not offend community standards for the State of Illinois, in violation of the defendant's rights under the First and Fourteenth Amendments to the Constitution of the United States. *People v. Ridens*,

59 Ill.2d 362, 321 N.E.2d 264 (1974); *People v. Nelson*, 88 Ill.App.3d 196, 410 N.E.2d 476 (1980).

6. That the trial court erred in permitting the Assistant State's Attorney during closing argument to state on multiple occasions, over the defendant's objection, that the jury as members of the community of Illinois could determine whether the materials on trial were obscene, and in addition, said prosecutor made other arguments directed to the personal bias and prejudice of the jurors regarding obscenity and availability of materials to minors. While the trial court sustained defendant's objection to improper argument of the Assistant State's Attorney, on the whole, said argument was so prejudicial and constituted an appeal to the personal feelings of the jury that it violated the defendant's right to a fair trial in an obscenity case under principles of the First, Sixth and Fourteenth Amendments to the Constitution of the United States.

WHEREFORE, the defendant, CHARLES G. MORRISON, prays that the court would enter a judgment of acquittal notwithstanding the verdict in this case or, in the alternative, would grant the defendant a new trial.

CHARLES G. MORRISON,
Defendant

BY: J. STEVEN BECKETT

/s/ J. Steven Beckett
His Attorney

(Certificate of Service omitted in printing)

State of Illinois

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT

County of Winnebago

No. 83 CM 4116

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

RICHARD POPE

Defendant

INFORMATION

(Filed July 22, 1983)

The State's Attorney of said County charges:

COUNT I

That on the 21st day of July, 1983, County of Winnebago and State of Illinois, RICHARD POPE committed the offense of Obscenity, in that he, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, sold a certain obscene magazine, to-wit: Full Throttle, in violation of Paragraph 11-20 (a) (1), Chapter 38, Illinois Revised Statutes.

COUNT II

That on the 21st day of July, 1983, RICHARD POPE committed the offense of Obscenity, in that he, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, sold a certain

obscene magazine, to-wit: Fuck Around in violation of Para. 11-20 (a) (1), Chapter 38. Illinois Revised Statutes.

COUNT III

That on the 21st day of July, 1983, RICHARD POPE committed the offense of Obscenity, in that he, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, sold a certain obscene magazine, to-wit: Anal Animal in violation of Paragraph 11-20(a)(1), Chapter 38, Illinois Revised Statutes.

DANIEL D. DOYLE
State's Attorney of
Winnebago County

By: Daniel F. Torrisi
Assistant State's Attorney

(Portions stricken by oral amendment prior to trial deleted and affidavit and bail setting omitted in printing)

IN THE CIRCUIT COURT
OF THE 17TH JUDICIAL CIRCUIT
WINNEBAGO COUNTY, ILLINOIS
No. 83-CM-4116

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff,

v.

RICHARD POPE,

Defendant.

MOTION TO DISMISS

(Filed September 28, 1983)

NOW COMES the defendant, RICHARD POPE, by his a ttorney, J. STEVEN BECKETT of RENO, O'BYRNE & KEPLEY, and for his motion to dismiss the information herein, and in support thereof, alleges and states as follows:

1. That the information is legally insufficient and violates the defendant's rights to proper notice under the First and Fourteenth Amendments to the Constitution of the United States, and under Chapter 38, § 111-3. Ill.Rev. Stat., in that said information fails to allege the necessary material elements of the legal definition of obscenity.

2. That the information and statute under which it is brought, namely Ill.Rev.Stat., Ch. 38, ¶ 11-20, are so vague, indefinite, uncertain and overbroad so as to fail to give guidance as to the conduct to be proscribed, in violation of the defendant's rights under the First and Fourteenth Amendments to the Constitution of the United States. Further, that the history of the statute upon which the information is based is as follows:

(a) Said statute was enacted in its present form in 1961;

(b) Said statute has been judically construed multiple times without further legislative revision, including the following:

(i) The third element of the tripartite test under *Memoirs v. Massachusetts,* 383 U.S. 415, 86 S.Ct. 975 (1966), "utterly without redeeming social value", was added by judicial construction. *People v. Ridens (Ridens I),* 51 Ill.2d 410, 282 N.E.2d 691 (1972), vacated and remanded as *Ridens v. Illinois,* 413 U.S. 912, 93 S.Ct. 3046 (1973); *People v. Thomas,* 37 Ill. App.3d 320, 346 N.E.2d 190 (1976); *People v. Stromblad,* 55 Ill.App.3d 511, 370 N.E.2d 1181 (1977).

(ii) A statewide "community standard" has been imposed by judicial construction. *People v. Price,* 8 Ill.App.3d 158, 289 N.E.2d 280 (1972); *People v. Ridens, (Ridens II),* 59 Ill.2d 362, 321 N.E.2d 264 (1974), cert. denied, 421 U.S. 993, 95 S.Ct. 2000 (1975); *Eagle Books v. City of Rockford,* 66 Ill.App.3d 1038, 384 N.E.2d 493 (1978).

(iii) That part (b) of the tripartite test of *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607 (1973), including the explanatory examples (a) and (b), have been judicially engrafted onto the statute in *Ward v. Illinois,* 431 U.S. 767, 97 S.Ct. 2085 (1977).

(c) That unless judicially construed otherwise, the statute is unconstitutional in the following respects:

(i) It allows the trier of fact to consider the effect of materials on children as part of the relevant

community, Chapter 38, ¶ 11-20(c), in violation of principles announced in *Pinkus v. United States,* 436 U.S. 293, 98 S.Ct. 1808 (1978).

(ii) It fails to require that the element of "utterly without redeeming social value" be adjudged solely on an objective basis as opposed to reference to contemporary community standards. *Smith v. United States,* 431 U.S. 291, 97 S.Ct. 1756 (1977), *United States v. Heyman,* 562 F.2d 316 (4th Cir., 1977), and *State v. Princess Cinema of Milwaukee, Inc.,* — Wis. —, 292 N.W.2d 807 (1980);

(iii) It fails to allow an affirmative defense for a dissemination to all adults instead of certain special classifications of persons (Ch. 38, ¶ 11-20(f)(2)). *People v. Wrench,* 83 Misc.2d 95, 371 N.Y.S.2d 833 (1975).

3. That the Illinois Obscenity Statute, as written and as judicially construed, is unconstitutionally vague, indefinite, uncertain, overbroad, and fails to give guidance as to the conduct prescribed, all in violation of the defendant's rights under the First and Fourteenth Amendments to the Constitution of the United States; in addition, further judicial construction of said statute in an attempt to save the statute should be declined. *State v. Princess Cinema of Milwaukee, Inc.,* — Wis. —, 292 N.W.2d 807 (1980).

4. That the standards set forth by the United States Supreme Court with respect to state obscenity statutes, as utilized by the Illinois Supreme Court with respect to Chapter 38, ¶ 11-20, Illinois Revised Statutes, are so vague, indefinite, uncertain and overbroad that said standards

violate defendant's rights to notice under the First and Fourteenth Amendments to the Constitution of the United States. *Ward v. Illinois,* 431 U.S. 767, 777, 97 S.Ct. 2085, 2091 (1977).

5. That there exists no compelling governmental interest to constitutionally permit prosecution for the communication of ideas via speech and press regarding sexual matters, thereby rendering the said Illinois Obscenity Statute, Chapter 38, ¶ 11-20, Illinois Revised Statutes (1981), unconstitutional.

6. That the material in question under the information, namely the magazines entitled "Full Throttle", "Fuck Around", and "Anal Animal" may not be criminally proscribed and are protected by the First Amendment to the Constitution of the United States as a matter of law; further, that the court is required to make an independent judicial review under principles announced in *Jenkins v. Georgia,* 418 U.S. 153, 94 S.Ct. 2750 (1974), *People v. Ridens,* 59 Ill.2d 362, 321 N.E.2d 264 (1974), and *People v. Ward,* 63 Ill.2d 437, 349 N.E.2d 47 (1976).

7. That the materials which form the basis of the charge herein were only made available to consenting adults and were not foisted on unconsenting adults or made available to minors; further, that prosecution for sale or distribution of the materials in this context violates the right of privacy guaranteed by the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments to the Constitution of the United States and the penumbra of the Bill of Rights.

WHEREFORE, the defendant, RICHARD POPE, prays that the court would make an independent constitu-

tional determination of the obscenity *vel non* of the materials that are the subject of this charge and, further, that the information against him be dismissed and that the Illinois Obscenity Statute, Ch. 38, ¶ 11-20, be declared unconstitutional for one or more of the aforementioned reasons.

RICHARD POPE, Defendant

/s/ J. Steven Beckett
His Attorney

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(Certificate of Service omitted in printing)

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT

WINNEBAGO COUNTY, ILLINOIS

NO. 83-CM 4116

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff

vs.

RICHARD POPE,

Defendant.

DEFENDANT'S INSTRUCTION NO. 2

A magazine is obscene if:

(1) Considered as a whole, its predominate appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion; and

(2) It depicts or describes, in a patently offensive way, sexual conduct; for example, by a patently offensive description or representation of ultimate sexual acts, normal or perverted, actual or simulated, or by a patently offensive description or representation of masturbation, excretory functions, or lewd exhibition of the genitals; and

(3) It is utterly without redeeming social value.

You must find that all three elements exist in the magazine for it to be obscene.

In determining whether a magazine is obscene, you must not judge it by your own personal standards, even if you are personally offended by the material.

Your verdict must be based on the evidence and testimony in this case and your determination of community

standards for the State of Illinois; that is, how the magazine would be viewed by ordinary adults in the whole state rather than by the people in any single city or town or region within the state.

GIVEN X — Defendant's Instruction No. 2

REFUSED— — I.P.I. 9.57 (Modified)

Ward v. Illinois, 431 U.S. 767, 97 S.Ct. 2085 (1977)
People v. Butler, 49 Ill.2d 435, 275 N.E.2d 400 (1971)
People v. Ridens, 59 Ill.2d 362, 321 N.E.2d 264 (1974)
Eagle Books v. City of Rockford, 66 Ill.App.3d 1038, 384 N.E.2d 493 (1978)
People v. Nelson, 88 Ill.App.3d 196, 410 N.E.2d 476 (1980)

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL DISTRICT
WINNEBAGO COUNTY, ILLINOIS
No. 83-CM-4116

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff,

vs.

RICHARD POPE,
Defendant.

POST-TRIAL MOTION FOR JUDGMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

(Filed October 4, 1984)

NOW COMES the defendant, RICHARD POPE, by his attorneys, Reno, O'Byrne & Kepley, P.C., and for his post-trial motion for judgment of acquittal notwithstanding the verdict of guilty returned by the jury in the above-mentioned case, or in the alternative, for a new trial, and in support thereof alleges and states as follows:

1. That the trial court erred in denying the defendant's motion to dismiss and all of its included allegations regarding the information, the Illinois Obscenity Statute, and the communcative materials on trial, in violation of the defendant's rights under the First and Fourteenth Amendments to the Constitution of the United States.

2. That Counts I, II, and III of the information, which were amended on their face immediately prior to trial upon the motion of the state by striking out the

words "to John Versetti at 623 7th Street, Rockford, Illinois", further fail to state an offense in that the person to whom the magazines were allegedly sold is not specified. Said omission fails to adequately advise the defendant of the charges against him, and further fails to protect the defendant from future prosecutions arising out of the same acts, thus rendering all counts of the information void and violating the defendant's rights under the First, Sixth, and Fourteenth Amendments to the Constitution of the United States.

3. That the trial court erred in sustaining the State's objections during *voir dire* to defendant's questions relating to the following:

(a) Whether the jury had a pre-conceived notion that merely because sexual intercourse was portrayed in a magazine, such portrayal automatically made the magazine obscene;

(b) Whether the jury believed that an adult should be allowed to see or read anything that he or she wants to in the privacy of his or her home.

4. That the trial court erred in admitting certain pictures marked as People's exhibits 7 and 8 over defendant's objection on relevancy grounds.

5. That the trial court erred in admitting certain pictures marked as People's exhibits 9, 10, 11, 12, 13, 14, 15, 16, and 17 over defendant's objections on relevancy grounds and on grounds that said pictures were prejudicial, focusing in on the covers of certain magazines or on certain items which were unrelated to the charges and which magazines were not displayed as a whole.

6. That the trial court erred in giving People's instruction number 10 and in refusing defendant's tendered

instructions number 3, 4, and 5, thus confusing the jury and allowing it to return a verdict of guilty on the charge of obscenity as it related to one or more of the magazines without all of the necessary elements being proved beyond a reasonable doubt as to any one magazine.

7. That the trial court erred in refusing defendant's tendered instructions number 6 and 7, which correctly recited the necessary and applicable principles of the law of obscenity where a defendant adduces evidence regarding community standards, in violation of defendant's rights under the First and Fourteenth Amendments to the Constitution of the United States.

8. That the trial court erred in refusing defendant's instruction number 8.

9. That the state failed to meet its burden of proof beyond a reasonable doubt to adduce testimony demonstrating the materials on trial offended contemporary community standards for the State of Illinois when, during *voir dire*, the jury conclusively established that it would be unable to ascertain such standard without evidentiary assistance, and in the face of testimony adduced by the defendant that the materials did not offend community standards for the State of Illinois, in violation of the defendant's rights under the First and Fourteenth Amendments to the Constitution of the United States. *People v. Ridens*, 59 Ill.2d 362, 321 N.E.2d 264 (1974); *People v. Nelson*, 88 Ill.App.3d 196, 410 N.E.2d 476 (1980).

10. That the state failed to meet its burden of proof beyond a reasonable doubt as to the element of knowledge or *scienter* on the part of the defendant.

11. That the trial court erred in permitting the Assistant State's Attorney during closing arguments to state, over the defendant's objection, that the jury, based upon its own feelings and knowledge, could determine that the materials on trial were obscene, thus leading the jury to believe that it could apply a personal standard rather than a state-wide community standard, violating the defendant's right to a fair trial in an obscenity case under principles of the First, Sixth, and Fourteenth Amendments to the Constitution of the United States.

12. That the trial court erred in permitting the Assistant State's Attorney during closing argument to suggest, over the defendant's objection, that the jury could convict the defendant of the crime of obscenity on something less than proof of all of the necessary elements, thus violating defendant's right to a fair trial in an obscenity case under principles of the First, Sixth, and Fourteenth Amendments to the Constitution of the United States.

WHEREFORE, the defendant, RICHARD POPE, prays that the court would enter a judgment of acquittal notwithstanding the verdict in this case or, in the alternative, would grant the defendant a new trial.

RICHARD POPE, Defendant

By: Reno, O'Byrne & Kepley, P.C.
His Attorneys

By: /s/ Glenn A. Stanko

(Certificate of Service omitted in printing)

Supreme Court, U.S.
FILED
NOV 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1973

In The
Supreme Court of the United States
October Term, 1986

RICHARD POPE and
CHARLES G. MORRISON,

Petitioners,

vs.

STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether contemporary community standards are to be applied to the value element of the tripartite test for obscenity articulated in *Miller v. California*, 413 U.S. 15 (1973).

TABLE OF CONTENTS
SUBJECT INDEX

Page

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Statement of the Case 3

Summary of Argument 7

Argument 10

I. In applying the constitutional test for obscenity, the value of materials must be measured independent of contemporary community standards. 11

A. The value element has served to limit the range of materials which may lose constitutional protection under the First and Fourteenth Amendments. 11

B. *Miller* and its progeny reflect the Court's determination that adjudication of the value element occur outside of contemporary community standards. 14

C. The Circuit Courts of Appeal and other state courts which have considered this issue have followed the lead of *Miller* and *Smith*. ... 19

D. The majority of the states which have legislatively acted to explicitly extend community standards beyond a single element have limited their application to the first two components. 20

E. Protected expression is endangered when community standards are allowed to override value. 22

II. The Illinois obscenity statute is unconstitutional, both on its face and as applied to the defendants, and reversal of their convictions is required. 29

Conclusion 32

APPENDIX INDEX

Page

United States Constitution, First Amendment .....App. 1

United States Constitution, Fourteenth Amendment .....App. 1

Illinois Obscenity Statute, Ill.Rev.Stat. 1983, ch. 38, ¶ 11-20 .....App. 1

Illinois Obscenity Statute, Ill.Rev.Stat. 1985, ch. 38, ¶ 11-20 .....App. 4

INDEX TO ABBREVIATIONS

J.A. —Joint Appendix

Pet.App.—Appendix to Petition for Writ of Certiorari

RM.C —Common Law Record (pleadings and papers filed) in *People v. Morrison*

RM. —Transcript of jury trial proceedings in *People v. Morrison*

RP.C —Common Law Record (pleadings and papers filed) in *People v. Pope*

RP. —Transcript of jury trial proceedings in *People v. Pope*

TABLE OF AUTHORITIES

CASES

Pages

Brockett v. Spokane Arcades, Inc., — U.S. —, 105 S.Ct. 2794 (1985) 10

Cox v. Louisiana, 379 U.S. 536 (1965) 30

Hamling v. United States, 418 U.S. 87 (1974) 16

Jacobellis v. Ohio, 378 U.S. 184 (1964) 12, 13

Jenkins v. Georgia, 418 U.S. 153 (1974) 8, 10, 15, 16, 18, 30

Kaplan v. California, 413 U.S. 115 (1973) 16

Lovell v. Griffin, 303 U.S. 444 (1938) 32

Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962) 12

Marks v. United States, 430 U.S. 188 (1977) 9, 29

Members of City Council v. Taxpayers for Vincent, — U.S. —, 104 S.Ct. 2118 (1984) 10, 31, 32

Memoirs v. Massachusetts, 383 U.S. 413 (1966) 8, 11, 13, 14, 29

Miller v. California, 413 U.S. 15 (1973) 7, 8, 10, 11, 13, 14, 15, 16, 17, 18, 19, 22, 24, 27, 28, 29

New York v. Ferber, 458 U.S. 747 (1982) 9, 30, 31

Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) 13

Penthouse International, Ltd. v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980) 9, 19

People v. Morrison, 138 Ill.App.3d 595, 486 N.E. 2d 345 (1985) 1

People v. Pope, 138 Ill.App.3d 726, 486 N.E.2d 350 (1985) 1

People v. Ridens, 59 Ill.2d 362, 321 N.E.2d 264 (1974), cert. denied 421 U.S. 993 (1975) 8, 11, 27

Regina v. Hicklin, [1868] L.R. 3 Q.B. 360 11

TABLE OF AUTHORITIES—Continued

Page

Roth v. United States, 354 U.S. 476 (1957) 11, 12, 13, 23

Secretary of State of Maryland v. Joseph H. Munson Co., — U.S. —, 104 S.Ct. 2839 (1984) 31

Smith v. United States, 431 U.S. 291 (1977) 8, 17, 18, 19, 20, 32

State v. Bartanen, 121 Ariz. 454, 591 P.2d 546 (1979) 9, 20

State v. Princess Cinema of Milwaukee, Inc., 96 Wis.2d 646, 292 N.W.2d 807 (1980) 9, 19

Stromberg v. California, 283 U.S. 359 (1931) 32

Terminiello v. City of Chicago, 337 U.S. 1 (1949) 10, 32

United States v. Bagnell, 679 F.2d 826 (11th Cir. 1982), *cert. denied* 460 U.S. 1047 (1983) 9, 19

United States v. Heyman, 562 F.2d 316 (4th Cir. 1977) 9, 19

United States v. Merrill, 746 F.2d 458 (9th Cir. 1984), *cert. denied* — U.S. —, 105 S.Ct. 926 (1985) 9, 16, 19

Ward v. Illinois, 431 U.S. 767 (1977) 10

CONSTITUTIONAL PROVISIONS

United States Constitution, First Amendment 2, 3, 7, 11, 14, 18, 25, 28, 29, 30, 32

United States Constitution, Fourteenth Amendment 2, 3, 11, 14, 29, 30, 32

STATUTES

28 U.S.C. § 1257(3) 2

Ariz. Rev. Stat. Ann. § 13-3501(2)(a), (b) (Supp. 1986) 20

TABLE OF AUTHORITIES—Continued

Page

Colo. Rev. Stat. § 18-7-101(2), (4) (1986) 21
Conn. Gen. Stat. Ann. § 53a-193(a) (West 1985) 21
Fla. Stat. Ann. § 847.07(2) (West 1976 & Supp. 1986) ... 21
Ill.Rev.Stat., Ch. 38, ¶ 11-20 (1983) 2, 8, 32
Ill.Rev.Stat., Ch. 38, ¶ 11-20 (1985) 21
Iowa Code Ann. § 728.4 (Supp. 1986) 21
Kan. Stat. Ann. § 21-4301(2) (a) (1981) 22
Mich. Comp. Laws Ann. § 752.362(5) (Supp. 1986) 22
Miss. Code Ann. § 97-29-103(1), (4) (Supp. 1986) 21
Mo. Ann. Stat. § 573.010(9) (Vernon Supp. 1986) 21
N. Y. Penal Law § 235.00(1) (McKinney 1980) 22
N.C. Gen. Stat. § 14-190.1(b) (1986) 22
N.D. Cent. Code § 12.1-27.1-01(4), (7) (1985) 21
R. I. Gen. Laws § 11-31-1 (1981) 21
S. C. Code Ann. § 16-15-260(a),(c),(e) (Law Co-op 1976) 21
Tex. Penal Code Ann. § 43.21(a)(1) (Vernon 1986 Supp.) 21
W. Va. Code § 7-1-4 (1984) 21
Wyo. Stat. § 6-4-301(a) (iii) (1983) 21

OTHER AUTHORITIES

Federal Advisory Committee Act, 5 U.S.C. App. 2, 86 Stat. 770 (1972) 24

Attorney General's Commission on Pornography, Final Report, July, 1986 ..... 25, 26

McGeady, "Outlawing Pornography: What We Gain, What We Lose", *Human Rights*, Spring, 1985 27

Vonnegut, "He Leadeth Us from Porn. God Bless You, Edwin Meese!" *Nation*, 1/25/86 27

No. 85-1973

In The
Supreme Court of the United States
October Term, 1986

RICHARD POPE and
CHARLES G. MORRISON,

Petitioners,

vs.

STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Appellate Court of the State of Illinois, Second District, in *People v. Pope* is reported at 138 Ill.App.3d 726, 486 N.E.2d 350 (1985). A copy of the opinion is included as Exhibit "A" at page App. 1 in the Appendix to the printed Petition for Certiorari.

The opinion of the Appellate Court of the State of Illinois, Second District, in *People v. Morrison* is reported

at 138 Ill.App.3d 595, 486 N.E.2d 345 (1985). A copy of the opinion is included as Exhibit "B" at page App. 25 in the Appendix to the printed Petition for Certiorari.

JURISDICTION

In the proceedings below, the defendants, Richard Pope and Charles G. Morrison, attacked the Illinois obscenity statute, Ill.Rev.Stat. 1983, ch. 38, ¶ 11-20, as being repugnant to the First and Fourteenth Amendments to the Constitution of the United States. In written opinions filed on November 26, 1985, the Illinois Appellate Court, Second District, specifically rejected this contention. Timely petitions for rehearing were denied by that court on December 31, 1985. The defendants then sought leave to appeal from the Illinois Supreme Court, which was denied on April 2, 1986. A Petition for Writ of Certiorari was filed with this Court on May 30, 1986, and was granted on October 6, 1986. The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States and the Illinois obscenity statute, Ill. Rev. Stat. 1983, ch. 38, ¶ 11-20, are involved. The text of the First and Fourteenth Amendments is set forth at page App. 1 of the Appendix to this brief. The text of the Illinois obscenity statute is set forth at page App. 1 of the Appendix to this brief.

STATEMENT OF THE CASE

Each of the defendants was charged with the sale of three obscene magazines, with both sales occurring July 21, 1983. (J.A.4,18) In each case, a pre-trial motion to dismiss was filed which asserted, among other things, that the Illinois obscenity statute, as written and construed, was unconstitutional under the First and Fourteenth Amendments of the Constitution of the United States. (J.A.6-10,20-24) A specific reason raised was the statute's failure to require that the value element of the tripartite test for obscenity be adjudged solely on an objective basis as opposed to reference to contemporary community standards. (J.A.8,22) The motions were denied, as confirmed by the trial court's refusal to grant the separate written post-trial motions filed on behalf of the defendants. (J.A.1,3,15-17,27-30)

The case against Charles G. Morrison was heard by a jury in Winnebago County, Illinois, on April 2 and 3, 1984. The only occurrence witness to testify for the State was Rockford Police Detective Steven B. Olson, who went to the Adult Book and Cinema at 519 West State, Rockford, Illinois, on July 21, 1983. (RM.140) A sign on the outside identified the store as an adult bookstore, while any view into the interior was obscured. (RM.166) Upon entering into the store, Detective Olson paid defendant Morrison, who was behind the counter, a fifty cent browsing fee. (RM.143-144) After browsing through the materials in the store, the detective selected three magazines and purchased them from the defendant. The defendant then placed the magazines in a brown paper bag and the detective left the store. (RM.144-150) Morrison was subsequently arrested and charged.

The three magazines were admitted into evidence. (People's Ex. 15, 16, 17; RM.127,147-148,186) Another exhibit reflected that entrance to the store was limited to persons 18 years of age or older. (People's Ex. 1; RM. 127,178,184)

The defendant called two persons to testify on his behalf. A college student testified that he went to various adult bookstores throughout the State of Illinois where he purchased magazines with levels of sexual explicitness comparable to those involved in the defendant's trial. (RM.189-206) Dr. Roderick Bell testified as an expert on public opinion polling and provided the foundation for, and the substantive results of, a community standards survey for the State of Illinois. (RM.233-274)

During the instruction conference, People's Instruction No. 12 was tendered and objected to on the basis that it incorrectly stated the definition of obscenity. (J.A.11; RM.218-219) Defendant's Instructions No. 5 and 6, which would have limited application of contemporary community standards to the first two elements of the definition, were refused. (J.A.13,14; RM.226-227)

The jury found defendant Morrison guilty of obscenity on all three counts. (J.A.1) A post-trial motion was filed, once again raising the constitutional issue, and was denied. (J.A.1,15-17) The defendant was sentenced to a period of twelve months conditional discharge and assessed a fine of $1,500 plus costs. (RM.C2,99)

The trial of Richard Pope, which was held on September 10 and 11, 1984, followed a similar scenario. Detective John Versetti of the Rockford Police Department was the State's sole occurrence witness. At the direction

of his superiors, Detective Versetti went to an adult bookstore at 623 Seventh Street, Rockford, Illinois, on July 21, 1983. (RP.184-185,198) The exterior of the bookstore contained signs identifying it as an adult bookstore and limiting admission to persons 18 years of age and over. (RP.199)

After entering the store, Versetti paid a fifty cent browsing fee to defendant Pope, who was behind the counter. (RP.185-186,191) The detective looked through the materials for ten to fifteen minutes, selected three magazines on his own, and presented them to the defendant at the counter for purchase. (RP.191,201) The defendant advised Versetti that the cash register was not working and that he was new at the store and did not know how to fix it. Versetti was told that if he came back later, the day crew, who would be able to fix the cash register, would be there and he could purchase the magazines at that time. The magazines were placed on a shelf next to the counter. When Versetti returned later, the defendant was still behind the counter and the purchase was completed, with the magazines being placed in a brown paper bag. (RP. 194-196) Those magazines were admitted into evidence. (People's Ex. 1A, 1B, 1C; RP.174,192-193,217)

The defense witnesses once again consisted of the college student, who had purchased comparable materials throughout the State of Illinois, and the testimony of Dr Bell relating to the community standards survey. (RP. 226-245,251-283)

The definitional instruction of obscenity tendered by the defendant was given by the trial judge. (J.A.25) Consistent with prior construction, including the denial of

the motion to dismiss, that instruction applied contemporary community standards to all three elements of the three part test for obscenity.

The jury found the defendant, Richard Pope, guilty of the crime of obscenity on all counts. (J.A.2) After denial of the written post-trial motion (J.A.3,27-30), the defendant was sentenced to concurrent sentences of one hundred twenty days imprisonment on each of the three counts and consecutive fines of $1,000 on each of the three counts. (RP.C2)

Both defendants took timely appeal to the Illinois Appellate Court, Second District. In written opinions filed November 26, 1985, the Illinois Appellate Court, Second District, affirmed the conviction of Charles G. Morrison and affirmed the conviction of Richard Pope, although it vacated the sentence of defendant Pope and remanded the case for resentencing. (Pet.App.1-33)

The constitutional issue presented in this case was summarily rejected by the Illinois Appellate Court in the *Pope* opinion:

> Defendant next challenges the obscenity statute on the basis that a constitutional infirmity exists because an objective standard as opposed to a contemporary community standard should be required in determining if allegedly obscene materials are 'utterly without redeeming social value.' To support this contention, defendant relies heavily on a Wisconsin Supreme Court case (*State v. Princess Cinema of Milwaukee, Inc.* (1980), 96 Wis.2d 646, 292 N.W.2d 807), in which that court refused to further judicially construe the Wisconsin obscenity statute and called upon the Wisconsin legislature to redefine obscenity so as to agree with the most recent United States Supreme Court

> cases in the area of obscenity. However, *Princess Cinema* is distinguishable from the case at bar because Illinois courts have never been reluctant to construe the constitutionality of the Illinois obscenity statute. It should also be noted that, thus far, the United States Supreme Court has never held that an objective standard as opposed to a community one should be applied in adjudging if materials are 'utterly without redeeming value'. (Pet.App.8)

The constitutional issue in *Morrison* was addressed by reference to the *Pope* opinion (Pet.App.28), while the instruction issue was discounted in virtually identical language:

> We choose to dismiss this argument by simply pointing out that the United States Supreme Court has never held that an objective standard as opposed to a community one should be applied in adjudging if materials are 'utterly without redeeming social value.' On the facts of this case, we see no reason why we should hold otherwise. (Pet.App.31)

Rehearing was denied by the Appellate Court in both cases on December 31, 1985. (Pet.App.34-35) Leave to appeal was sought in the Illinois Supreme Court and was denied in both cases on April 2, 1986. (Pet.App.36-37) The defendants sought certiorari in this Court on May 30, 1986, and certiorari was granted October 6, 1986.

SUMMARY OF ARGUMENT

1. In *Miller v. California*, 413 U.S. 15 (1973), this Court articulated First Amendment standards for the regulation of obscenity. The third component of the tri-

partite test requires that the trier of fact determine "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." The Illinois obscenity statute at issue, Ill.Rev.Stat. 1983, ch. 38, ¶ 11-20, has been construed to incorporate the *Miller* standards, but has retained as its third element the "utterly without redeeming social value" test of *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). *People v. Ridens*, 59 Ill.2d 362, 321 N.E.2d 264 (1974), cert. denied 421 U.S. 993 (1975).

2. While the *Miller* formulation did not clearly identify the components to which contemporary community standards are to be applied, *Miller* did discuss the underlying questions of fact, "prurient interest" and "patently offensive", in the context of community standards. 413 U.S., at 30. Later, *Smith v. United States*, 431 U.S. 291 (1977) interpreted *Miller* to require application of contemporary community standards to the "prurient interest" and "patently offensive" components, but not to the value determination.

3. *Miller* rejected the concept of national community standards and *Jenkins v. Georgia*, 418 U.S. 153 (1974) stamped the Court's imprimatur upon locally determined community standards. As a result, a value element unfettered by community standards is the only remaining part of the test for obscenity upon which meaningful independent review under a national constitution may be exercised. This conclusion is evidenced by the Court's observation in *Smith* that the value element is "particularly amenable to appellate review". 431 U.S., at 305.

4. The failure of the Illinois obscenity statute, as written and construed, to limit application of contemporary

community standards to the "prurient interest" and "patently offensive" elements, is in conflict with the federal and state courts which have considered the question. *United States v. Heyman,* 562 F.2d 316 (4th Cir. 1977); *Penthouse International Ltd. v. McAuliffe,* 610 F.2d 1353 (5th Cir. 1980); *United States v. Bagnell,* 679 F.2d 826 (11th Cir. 1982), *cert. denied* 460 U.S. 1047 (1983); *United States v. Merrill,* 746 F.2d 458 (9th Cir. 1984), *cert. denied* — U.S. —, 105 S.Ct. 926 (1985); *State v. Princess Cinema of Milwaukee, Inc.,* 96 Wis.2d 646, 292 N.W.2d 807 (1980); *State v. Bartanen,* 121 Ariz. 454, 591 P.2d 546 (1979). Furthermore, few state legislatures have engrafted community standards upon the value consideration.

5. Each of the integral parts of the test for obscenity is instrumental in discharging the function of recognizing protected from unprotected speech. A determination of obscenity made entirely on a parochial "majority view" basis is inconsistent with public policy. To allow such a determination jeopardizes expression of art and literature which may ultimately be found non-obscene.

6. Even if a proper constitutional test were utilized, it would be inappropriate for this Court to evaluate the subject materials. To do so would deprive the defendants of the benefit of an initial jury determination. *Marks v. United States,* 430 U.S. 188, 196, n.12 (1977). The appropriate remedy is reversal of the convictions because of the unconstitutional application of the Illinois obscenity statute. *New York v. Ferber,* 458 U.S. 747, 773 (1982). In addition, since there is no conceivable way in which the statute could be constitutionally applied, it should be

facially invalidated. *Members of City Council v. Taxpayers for Vincent,* — U.S. —, 104 S.Ct. 2118, 2124-2125 (1984); *Terminiello v. City of Chicago,* 337 U.S. 1 (1949).

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ARGUMENT

This case focuses upon the value element of the tripartite test for obscenity articulated in *Miller v. California,* 413 U.S. 15 (1973). That element, which is the third part of the tripartite test, has not previously been subjected to close scrutiny by this Court. On the other hand, the first element, "prurient interest", was the subject of this Court's recent attention in *Brockett v. Spokane Arcades, Inc.,* — U.S. —, 105 S.Ct. 2794 (1985). The second element, "patently offensive", came into consideration in *Jenkins v. Georgia,* 418 U.S. 153 (1974) and also in *Ward v. Illinois,* 431 U.S. 767 (1977). In *Ward,* this Court rejected constitutional attacks upon the same Illinois obscenity statute at issue in this case based on asserted infirmities relating to the "patently offensive" element.

This case comes to the Court in the context of a constitutional attack upon the Illinois obscenity statute, both facially and as applied. From the inception of the criminal charges against them, both of the defendants have contended that the value element of the obscenity test should be objectively determined without reference to contemporary community standards. At the time of their trial, the applicable value element under the Illinois obscenity statute, as construed by the Illinois Supreme Court,

was the "utterly without redeeming social value" standard of *Memoirs v. Massachusetts,* 383 U.S. 413 (1966) instead of the "lacks serious literary, artistic, political, or scientific value" test of *Miller. People v. Ridens,* 59 Ill.2d 362, 321 N.E.2d 264 (1974), cert. denied 421 U.S. 993 (1975). The defendants were afforded the less restrictive test, but it was applied using contemporary community standards.

Subsequent to the convictions of the defendants and the affirmance of those convictions by the Illinois Appellate Court, a new obscenity statute took effect on January 1, 1986, in the State of Illinois (Appendix to Brief, Page App. 4). That statute specifically substituted the "lacks serious literary, artistic, political, or scientific value" test for the "utterly without redeeming social value" standard and unambiguously applied contemporary community standards only to the first two parts of the three part test and not to the value element.

I. IN APPLYING THE CONSTITUTIONAL TEST FOR OBSCENITY, THE VALUE OF MATERIALS MUST BE MEASURED INDEPENDENT OF CONTEMPORARY COMMUNITY STANDARDS.

A. The Value Element Has Served To Limit The Range Of Materials Which May Lose Constitutional Protection Under The First And Fourteenth Amendments.

The value concept appeared in *Roth v. United States,* 354 U.S. 476 (1957), which represented this Court's first journey into the obscenity thicket. In *Roth,* this Court held that obscenity is not within the area of constitutionally protected speech or press. In rejecting the standard of *Regina v. Hicklin,* [1868] L.R. 3 Q.B. 360, which allowed the

material to be judged by the effect of an isolated excerpt upon particularly susceptible persons, the *Roth* Court adopted the following standard:

> [W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.
>
> 354 U.S., at 489.

Although the Court did not incorporate any value determination as part of the constitutional test, the majority opinion found "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." 354 U.S., at 484.

Unfortunately, after *Roth,* a majority of the Court would not agree on a test for obscenity until *Miller.* In a splintered decision in *Manual Enterprises, Inc. v. Day,* 370 U.S. 478 (1962), Justice Harlan, joined by Justice Stewart, recognized both the *Roth* "prurient interest" test and a "patent offensiveness" test. The purpose of the "patent offensiveness" component was to rescue those works which might appeal to a prurient interest, but, at the same time, have value. *Manual Enterprises, supra,* at 486-487. In essence, the "patent offensiveness" test, when applied with the national community standard recognized in *Manual Enterprises,* worked to perform a value check on the materials.

Jacobellis v. Ohio, 378 U.S. 184 (1964) was also decided by a divided Court. In his opinion, Justice Brennan, joined by Justice Goldberg, reaffirmed the *Roth* test, utilizing a national standard. At the same time, recognition was given to the fact that, in order to be obscene, material had to be "utterly without redeeming social importance" and that

any material with value which might appeal to the prurient interest was absolutely protected. Social importance could not be weighed against prurient appeal. *Jacobellis, supra,* at 191.

The Court once again grappled with the appropriate test in *Memoirs v. Massachusetts,* 383 U.S. 413 (1966). The plurality opinion articulated a three part test, including a "prurient interest" component, a "patently offensive" factor, and an element of whether the material was "utterly without redeeming social value". The plurality reversed the conviction based upon its determination that the book, *Fanny Hill,* was not utterly without redeeming social value.

The years between *Memoirs* and *Miller* saw no agreement by a majority of the Court on the obscenity issue. The practice during that period was summarized by Justice Brennan in his dissenting opinion in *Paris Adult Theatre I v. Slaton,* 413 U.S. 49 (1973):

> In the face of this divergence of opinion the Court began the practice in *Redrup v. New York,* 386 U.S. 767 (1967), of *per curiam* reversals of convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, deemed not to be obscene.
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> 413 U.S., at 82. (footnote omitted)

Based on *Roth* and *Memoirs,* it is a safe assumption that considerations of value were an ingredient in the *Redrup per curiam* reversals.

B. Miller And Its Progeny Reflect This Court's Determination That Adjudication Of The Value Element Occur Outside Of Contemporary Community Standards.

In *Miller v. California*, 413 U.S. 15 (1973), the Court established guidelines for the regulation of obscenity consistent with the First and Fourteenth Amendments:

> The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin, supra,* at 230, quoting *Roth v. United States, supra,* at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.
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> 413 U.S., at 24.

In adopting the third feature of the test, the Court specifically rejected the "utterly without redeeming social value" test of *Memoirs, supra.* In addition, it relied upon the availability of an independent review of the constitutional claims by the appellate courts on the issue of obscenity.

While the literal language of the test promulgated by the Court appeared to apply contemporary community standards to only the "prurient interest" element, later discussion by the Court revealed that both "prurient interest" and "patently offensive" were to be judged in light of contemporary community standards:

> Under a National Constitution, fundamental First Amendment limitations on the powers of the States

> do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive.' These are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists.
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> 413 U.S., at 30.

At the same time, the Court's opinion recognized the important function of the value element:

> The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent.
>
> 413 U.S., at 34.

Adoption of an explicit value element unencumbered by contemporary community standards was consistent with the rejection of national community standards. With a national community standard, the Court would have been in a position to make a plenary constitutional review of the materials under the "patently offensive" element, or, perhaps, even under the "prurient interest" element. However, with something less than a national standard, the Court's ability to review those elements would necessarily be limited because of its unfamiliarity with the various and varying communities.

Following *Miller*, the role of the value element and thus the need for its independence was underscored by this Court's opinion in *Jenkins v. Georgia*, 418 U.S. 153 (1974). In *Jenkins*, the Court sanctioned a "community" smaller

than the statewide dimension approved in *Miller* and *Kaplan v. California*, 413 U.S. 115 (1973). While, under *Jenkins*, a state was still free to choose a statewide community standard, it could also select a smaller geographic area. Alternatively, it could leave the precise geographic area unspecified, allowing the "juries to rely on the understanding of the community from which they came as to contemporary community standards". 418 U.S. at 157. *Accord, Hamling v. United States*, 418 U.S. 87, 104. This narrowing of the community left only an independent value element to rescue a work with serious value from an entirely parochial determination of obscenity.

While recognizing that the "patently offensive" inquiry was essentially a question of fact, *Jenkins* was able to decide the case on that component because of the complete absence of any hard-core sexual conduct. However, review on that element is limited. *United States v. Merrill*, 746 F.2d 458 (9th Cir. 1984), cert. denied — U.S. —, 105 S.Ct. 926 (1985). In a borderline case, significant independent constitutional review under a national constitution could occur only upon the value question and only if it was freed from the constraints of contemporary community standards. Recognition of the value element as the primary vehicle for appellate scrutiny was evident in the concurring opinion of Justice Brennan in *Jenkins:*

> After the Court's decision today, there can be no doubt that *Miller* requires appellate courts—including this Court—to review independently the constitutional fact of obscenity. Moreover, the Court's task is not limited to reviewing a jury finding under part (c) of the *Miller* test that 'the work, taken as a whole, lack[ed] serious literary, artistic, political, or scientific value.' *Miller* also requires independent review of a jury's

> determination under part (b) of the *Miller* test that 'the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law.'
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> 418 U.S., at 163-164.

If there were any lingering doubts as to which features of the *Miller* test were to be evaluated in light of contemporary community standards, *Smith v. United States*, 431 U.S. 291 (1977) appeared to lay them to rest. *Smith's* reading of *Miller* was discernible from the outset:

> In *Miller v. California*, 413 U.S. 15 (1973), this Court rejected a plea for a uniform national standard as to what appeals to the prurient interest and as to what is patently offensive; the Court held, instead, that these essentially were questions of fact to be measured by contemporary standards of the community.
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> 431 U.S., at 292-293.

Later, the Court extensively discussed the community standards issue:

> The phrasing of the *Miller* test makes clear that contemporary community standards take on meaning only when they are considered with reference to the underlying questions of fact that must be resolved in an obscenity case. The test itself shows that appeal to the prurient interest is one such question of fact for the jury to resolve. The *Miller* opinion indicates that patent offensiveness is to be treated in the same way. 413 U.S., at 26, 30. *See Hamling v. United States*, 418 U.S., at 104-105. The fact that the jury must measure patent offensiveness against contemporary community standards does not mean, however, that juror discretion in this area is to go unchecked. Both in *Hamling* and in *Jenkins v. Georgia*, 418 U.S. 153 (1974), the Court noted that part (b) of the *Miller* test contained a substantive component as well. The kinds

> of conduct that a jury would be permitted to label as 'patently offensive' in a § 1461 prosecution are the 'hard core' types of conduct suggested by the examples given in *Miller*. *See Hamling v. United States*, 418 U.S., at 114; *cf. Jenkins v. Georgia*, 418 U.S., at 160-161. Literary, artistic, political, or scientific value, on the other hand, is not discussed in *Miller* in terms of contemporary community standards. See generally F. Schauer, The Law of Obscenity 123-124 (1976).
>
> 431 U.S., at 300-301.

The *Smith* opinion made repeated reference to the proposition that "prurient interest" and "patent offensiveness" must be judged in light of contemporary community standards. 431 U.S., at 302, 303, 308, 309. *Smith* also recognized that the value element had to be met before a conviction could be upheld and that "this determination is particularly amenable to appellate review". 431 U.S., at 305.

In summary, even prior to *Miller*, the intrinsic value of a work served as a safety check upon a finding of obscenity. Under *Miller* and *Smith*, the Court continued to rely on a value element for control purposes. With the abandonment of national standards in *Miller* and the advent of local standards in *Jenkins*, a value element free of community standards was necessary in order to exercise any meaningful appellate review under a national constitution. The existence of such an unrestrained component was exemplified by the recognition of its particular reviewability in *Smith*.

At the same time, it must be remembered that any initial determination of obscenity is generally left to a jury. An independent value element enhances First Amend-

ment rights on that level as well. It allows a jury, in the first instance, to give protection to material which the community may subjectively consider valueless, but which, objectively viewed, meets the appropriate value standard.

C. The Circuit Courts Of Appeal And Other State Courts Which Have Considered This Issue Have Followed The Lead Of Miller And Smith.

Four circuit courts of appeal have recognized that contemporary community standards are to be applied only to the first two parts of the test for obscenity and not to the value component. *United States v. Heyman*, 562 F.2d 316 (4th Cir. 1977); *Penthouse International Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980); *United States v. Bagnell*, 679 F.2d 826 (11th Cir. 1982), cert. denied 460 U.S. 1047 (1983); *United States v. Merrill*, 746 F.2d 458 (9th Cir. 1984), cert. denied — U.S. —, 105 S.Ct. 926 (1985). In *Heyman*, the defendant's conviction was reversed because of a jury instruction which directed the jury to apply contemporary community standards to all three ingredients of the *Miller* test, including the value element. Similarly, while analyzing the standards to follow in reviewing the obscenity *vel non* of the materials at issue, *McAuliffe*, *Bagnell*, and *Merrill* all concluded that community standards were to be applied only to the "prurient interest" and to the "patently offensive" questions and not to the value element. *McAuliffe* and *Bagnell* specifically relied upon *Smith*. 610 F.2d at 1363; 679 F.2d at 835.

Two state supreme courts have also come to similar conclusions. In *State v. Princess Cinema of Milwaukee, Inc.*, 96 Wis.2d 646, 292 N.W.2d 807 (1980), the Wisconsin

Supreme Court specifically held that an objective test and not community standards had to be used in determining which material "lacks serious literary, artistic, political, or scientific value". Relying on *Smith*, the Wisconsin Supreme Court overruled an earlier decision which had held that contemporary community standards were to be applied to all three elements of the constitutional test. As a result of the infirmity, the Court invalidated the entire Wisconsin obscenity statute on overbreadth grounds, refusing to engage in any further judicial construction.

In *State v. Bartanen*, 121 Ariz. 454, 591 P.2d 546 (1979), the Arizona Supreme Court held that it was appropriate for a jury instruction to apply community standards to both the "prurient interest" and "patently offensive" elements. Subsequent to that decision, the Arizona obscenity statute was amended to specifically provide for application of community standards to those parts of the obscenity definition. Ariz. Rev. Stat. Ann. § 13-3501(2)(a), (b) (Supp. 1986)

It is apparent that no appellate court, state or federal, has reached a conclusion consistent with that of the Illinois Appellate Court in the cases of these defendants. The same may be said of most of the various state legislatures.

D. The Majority Of The States Which Have Legislatively Acted To Explicitly Extend Community Standards Beyond A Single Element Have Limited Their Application To The First Two Components.

In addition to Arizona, the states of Colorado, Iowa, Mississippi, North Dakota, Rhode Island, South Carolina,

Texas and Wyoming have statutes which explicitly apply community standards to the first two elements of the obscenity formulation. Colo. Rev. Stat. § 18-7-101(2), (4) (1986); Iowa Code Ann. § 728.4 (Supp. 1986); Miss. Code Ann. § 97-29-103(1), (4) (Supp. 1986);[1] N.D. Cent. Code § 12.1-27.1-01(4), (7) (1985); R.I. Gen. Laws § 11-31-1 (1981); S.C. Code Ann. § 16-15-260(a),(c),(e) (Law Co-op 1976); Tex. Penal Code Ann. § 43.21(a)(1) (Vernon 1986 Supp.); Wyo. Stat. § 6-4-301(a)(iii) (1983). Furthermore, as noted earlier, the new Illinois obscenity statute, which took effect January 1, 1986, explicitly applies contemporary community standards to the "prurient interest" and "patently offensive" elements, while omitting it from the value element. Ill.Rev.Stat. 1985, ch. 38, ¶ 11-20 (Appendix to Brief, Page App. 4).

Three states have obscenity statutes which, on their face, apply contemporary community standards to all three elements of the tripartite test. These include Connecticut, Florida, and Missouri. Conn. Gen. Stat. Ann. § 53a-193(a) (West 1985); Fla. Stat. Ann. § 847.07(2) (West 1976 & Supp. 1986); Mo. Ann. Stat. § 573.010(9) (Vernon Supp. 1986). Additionally, West Virginia has an enabling statute which follows the same format. W.Va. Code § 7-1-4(4) (1984).

Seven states currently have no statutes which proscribe the dissemination of sexually explicit materials to

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[1] *But see, Goldstein v. Allain,* 568 F.Supp. 1377 (N.D. Miss. 1983) [preliminary injunction entered against enforcement of statute].

adults (Alaska, Maine, Montana, Oregon,[2] South Dakota, Vermont, and Wisconsin). The remainder of the states either have statutes which, on their face, track the language of *Miller*, or make no reference to contemporary community standards. E.g. Kan. Stat. Ann. § 21-4301(2)(a) (1981); N.C. Gen. Stat. § 14-190.1(b) (1986); N.Y. Penal Law § 235.00(1) (McKinney 1980); Mich. Comp. Laws Ann. § 752.362(5) (Supp. 1986).

Fourteen states, then, have legislatively imposed community standards beyond the "prurient interest" feature of the *Miller* test. Out of those fourteen, ten have applied contemporary community standards to only the first two elements, while four have applied contemporary community standards to all three elements. The message sent by a plurality of the state legislatures on the community standards issue bespeaks a concern for the proper application of the value element of the obscenity test.

E. Protected Expression Is Endangered When Community Standards Are Allowed To Override Value.

The concept of community standards impacts not only the lower courts under the constitutional definition of obscenity, but also individuals and organizations at large within society. Across the United States the importance of contemporary community standards and its place within the definition of obscenity remain the subject of significant

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[2] *See State v. Henry*, 78 Or.App. 392, 717 P.2d 189 (1986) [statutory definition of "obscene" unconstitutionally vague under state constitution].

debate. The major purpose for the definition of obscenity is to provide a "separating function" for determination of protected from unprotected speech, and, depending on the viewpoint of the individual or the organization, the application of community standards to the value element of the test for obscenity is critical in approaching that separating function.

Each of the three elements of obscenity serves as a separate and independent check on the suppression of protected expression. The "prurient interest" element, from the outset of its pronouncement in *Roth*, has been tied to community attitudes, and has wide public as well as legal acceptance based on usage. The "patent offensiveness" component also relies in its application to community thought concerning the acceptability of depictions or descriptions of specified sexual conduct in books or films. The specificity requirement announced by this court in *Miller* also provides notice to the disseminator about the potential criminality of his acts based on the level of sexual candor, accomplishing another important purpose under criminal law, as well as addressing interests of freedom of expression. The incorporation of community standards into these two aspects of the obscenity test is wholly consistent with public and constitutional policy.

The significance of the value element "utterly without redeeming social value" for purposes of this discussion is entirely different from the other independent checks. Considering value presents the last opportunity for the trier of fact or a court upon independent constitutional review to focus upon the material itself. Notwithstanding its offensiveness to the relevent community, communication

may be "saved" by its value. This permits dissent and controversy in the advocacy of ideas in materials of a sexual nature. The legal survival of a book or magazine may very well depend upon the opportunity to escape condemnation permitted by usage of the value element. A vigorous and robust sexual debate is possible in the marketplace because value is not tied to community standards.

The danger attendant to construing "community standards" as applying to all of the tests for obscenity, including the value test, are illustrated by the recent recommendations of the Attorney General's Commission on Pornography. The Commission was established under the authority of the Federal Advisory Committee Act, 5 U.S.C. App.2, 86 Stat. 770 (1972), as amended by 90 Stat. 1241, 1247 (1976). It was formally created on May 20, 1985, when Attorney General Edwin Meese designated its eleven members. Over the course of eleven months, the Commission conducted public hearings and received information under its mandate to study the "problem of pornography" with a view to making recommendations about solving the problem. The viewpoints expressed by the majority of the commissioners were the first major non-legal public pronouncements on sexually explicit materials since the President's Commission Report on Obscenity and Pornography was released in 1970.

In the section of the Commission's report concerning legal aspects of the *Miller* test for obscenity, the Commission footnoted that local community standards did not apply to the value component of the *Miller* test:

> The third facet of the *Miller* test, that the work lack 'serious literary, artistic, political, or scientific value,' is never in any event to be determined by reference

> to local standards. Here the frame of reference must in all cases be national. *Smith v. United States*, 431 U.S. 291 (1977).
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> Attorney General's Commission on Pornography, Final Report, July, 1986, n. 36 at p. 259.

Seemingly, the Commission acknowledged that the legal position espoused by defendants Pope and Morrison was legally correct and yet, its official recommendations regarding private citizen activity undermine the legal findings and the purpose of non-application of local community standards to the value test.

In a section entitled "The Role of Private Action", the Commission insisted that citizenry with an anti-pornography viewpoint had a First Amendment right to speak out, reject and condemn that which would otherwise be protected by the First Amendment. The Commission noted:

> That governmental action against a certain variety of communication is unwise and unconstitutional does not mean that the communication is valuable, and does not mean that society is better off for having it. . . . That the Communist Party is a lawful organization does not prevent most Americans from finding its tenets abhorrent, and the same holds true for a wide variety of sexually oriented material. Much of that material is . . . protected by the First Amendment, but it does not follow that the material is harmless, or that its proliferation is good for society.
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> * * *
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> Communities are made up by what people say and do, by what people approve, and what people disapprove, and by what people tolerate and by what people reject. For communities and for the sense of community, community acceptance and community condemnation are central to what community is.

> Attorney General's Commission on Pornography, Final Report, pp. 419-420.

Armed with revelations about what constitutes a community within the meaning of community standards, the Commission arrived at suggestions for citizen involvement. In the Commission's view this would "aid in establishing and maintaining a community standard". (Page 1324). Specifically, in Suggestion 10, the Committee recommended that "[c]itizens can use grassroots efforts to express opposition to pornographic materials to which they object". The Commission elaborated:

> Some types of pornographic materials may be harmful, offensive and incompatible with certain community values, but nonetheless fall short of the legal standard for prosecution as obscenity. In these instances grassroots efforts may be an effective countermeasure. Grassroots actions are measures initiated and coordinated privately by citizens, without governmental intervention.
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> Attorney General's Commission on Pornography, at p. 1339.

The posture taken by this governmental commission is of no small moment on the issue before the Court. It suggests that art or literature can and should be subject to rejection depending on the views of individual citizens, thereby eradicating the constitutional separating function manifested by the value element. The Commission's Report is the embodiment of a governmental policy that would work substantial harm on the distribution or exhibition of non-obscene sexually explicit materials. Only staunch adherence to the *Miller* concept of community standards and its intended constitutional protection to art and literature

will free our society from a mandated moral viewpoint of an asserted majority of citizens.

In the context of a criminal obscenity case, prospective jurors receive mixed signals about the role community standards plays in the definition of obscenity. The common notion suggests that the local community can reject what it deems offensive regardless of its value. Anti-pornography forces provide heavy emphasis to support this conclusion that a "majority rule" of a local community can determine that material is worthless and therefore obscene. McGeady, "Outlawing Pornography: What We Gain, What We Lose", *Human Rights,* Spring 1985. On the other hand, contrasting viewpoints express the fear that even those who are serious about arts and literature will have to write with a fine point or paint with a tasteful brush to avoid moral censorship under application of the present concept of community standards. Vonnegut, "He Leadeth Us from Porn. God Bless You, Edwin Meese!" *Nation,* 1/25/86, p. 65.

Acting on *Miller's* suggestion, Illinois has elected to utilize a statewide community standard in its test for obscenity. *People v. Ridens,* 59 Ill.2d 362, 371, 321 N.E.2d 264, 269 (1974), *cert. denied* 421 U.S. 993 (1975). Prior to the recent amendment to the Illinois Obscenity Statute (Ill.Rev.Stat. 1985, ch. 38, ¶11-20), Illinois courts had never construed the predecessor statute to limit application of these statewide standards to the first two elements of the test. Thus, the statute lacked the proper checks because it permitted a value determination based on community standards. Expressions of art and literature were therefore jeopardized under such a statute when the concept of community standards was applied in the "majority rule" sense.

For the First Amendment to continue to have its paramount effect on the nation's discourse, this Court must unweave the web of confusion that permeates the concept of community standards, and the value element. Those standards are geographically based because it is prudent to do so in our federal system, where the state's role in enforcing criminal law is of predominant importance. Limitation of such geographic standards to the first two elements of the test for obscenity is logical because each of those two elements is independent of the value element, and serves a separate purpose. Value determination cannot be a result of the majority vote of the populous that material has value and instead, rests upon an independent value test and an objective review of the material itself.

Defendants urge that they face conviction and incarceration based on a majority viewpoint of the worth of the materials they were disseminating, and not the value of materials. This offends the First Amendment principles set forth by this court in *Miller*. It also represents a danger to putative criminal defendants who must decide whether to disseminate communicative items on the basis of public attitudes about obscenity, without giving any consideration to value. In short, a value determination based upon application of contemporary community standards permits the suppression of protected speech according to the tenor of the times. This cannot be constitutionally tolerated.

II. THE ILLINOIS OBSCENITY STATUTE IS UNCONSTITUTIONAL, BOTH ON ITS FACE AND AS APPLIED TO THE DEFENDANTS, AND REVERSAL OF THEIR CONVICTIONS IS REQUIRED.

The defendants assert their personal constitutional rights under the First and Fourteenth Amendments to the Constitution of the United States. They directly challenge the overly broad application of the Illinois obscenity statute to them through its imposition of contemporary community standards upon the value element of the three part obscenity test applicable in Illinois. The issue was squarely presented to the Illinois Appellate Court, which declined to narrow the reach of the statute and refused to overturn the defendants' convictions.

The defendants contend that the materials upon which they were tried could be deemed constitutionally protected by a jury administering the Illinois "utterly without redeeming social value" test, unrestrained by community standards. That they are entitled to have a jury make that initial determination is illustrated by *Marks v. United States*, 430 U.S. 188 (1977). In *Marks*, the defendant was charged with a federal obscenity violation arising before the *Miller* decision. This Court held that the defendant was entitled to the benefit of the less restrictive "utterly without redeeming social value" test of *Memoirs*. In so holding, the Court rejected the argument that the materials were obscene under either test and emphasized the importance of a jury determination:

> The Court of Appeals stated, apparently without reviewing the materials, 520 F.2d, at 923 n. 1 (McCree, J., dissenting), that in its opinion the materials here were obscene under either *Memoirs* or *Miller*. 520 F.2d, at 922. Such a conclusion, absent other depend-

> able means of knowing the character of the materials, is of dubious value. But even if we accept the court's conclusion, *under these circumstances it is not an adequate substitute for the decision in the first instance of a properly instructed jury, as to this important element of the offense* under 18 U.S.C. § 1465.
>
> 430 U.S., at 196, n. 12 (emphasis added).

The remedy to be exercised in the case of a criminal statute which has been unconstitutionally applied was addressed in *New York v. Ferber*, 458 U.S. 747 (1982):

> Indeed, the Court's practice when confronted with ordinary criminal laws that are sought to be applied against protected conduct is not to invalidate the law *in toto*, but rather to reverse the particular conviction. *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Edwards v. South Carolina*, 372 U.S. 229 (1973).
>
> 458 U.S., at 773.

The reason for reversal, of course, is that the defendant has engaged in speech protected by the First and Fourteenth Amendments, for which he may not be punished. *Cf. Cox v. Louisiana*, 379 U.S. 536 (1965); *Jenkins v. Georgia*, 418 U.S. 153 (1974). In the case of Charles G. Morrison and Richard Pope, that protected expression lies between a determination of value with and without application of contemporary community standards.

The defendants also assert the facial invalidity of the Illinois obscenity statute. Such facial challenges have been the subject of recent discussion by the Court:

> There are two quite different ways in which a statute or ordinance may be considered invalid 'on its face' —either because it is unconstitutional in every conceivable application, or because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally 'overbroad.'
>
> • • •

> The seminal cases in which the Court held state legislation unconstitutional 'on its face' did not involve any departure from the general rule that a litigant only has standing to vindicate his own constitutional rights. In *Stromberg v. California*, 282 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931) and *Lovell v. Griffin*, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed 949 (1938), the statutes were unconstitutional as applied to the defendants' conduct, but they were also unconstitutional on their face because it was apparent that any attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas. In cases of this character a holding of facial invalidity expresses the conclusion that the statute could never be applied in a valid manner. Such holdings invalidated entire statutes, but did not create any exception from the general rule that constitutional adjudication requires a review of the application of a statute to the conduct of the party before the Court.
>
> *Members of the City Council v. Taxpayers for Vincent*, — U.S. —, —, 104 S.Ct. 2118, 2124-2125 (1984) (footnotes omitted);

See also New York v. Ferber, 458 U.S. 747, 768, n. 21 (1982); *Secretary of State of Maryland v. Joseph H. Munson Co.*, — U.S. —, 104 S.Ct. 2839, 2852, n. 13 (1984).

If this Court should hold that the value element must be measured independent of contemporary community standards, there would be no conceivable way in which the statute could be validly applied. In any prosecution, under the statute, there would be a risk of conviction on materials which lie in that zone between "utterly without redeeming social value" objectively applied and "utterly without redeeming social value" measured by the standards of the community. Consequently, facial invalidation of the statute, together with reversal of the defen-

dants' convictions, is appropriate. *Members of City Council v. Taxpayers for Vincent, supra; Stromberg v. California,* 283 U.S. 359 (1931); *Lovell v. Griffin,* 303 U.S. 444 (1938); *Terminiello v. City of Chicago,* 337 U.S. 1 (1949).

CONCLUSION

A review of this Court's opinions in *Miller* and *Smith* yields the conclusion that contemporary community standards are to be applied only to the first two parts of the tripartite definition of obscenity and not to the value element. Such a result is entirely consistent with the greater independent constitutional review which may be exercised on that part of the test. The Illinois obscenity statute, Ill.Rev.Stat. 1983, ch. 38, ¶ 11-20, as written and construed and as applied in this case, is constitutionally infirm under the First and Fourteenth Amendments because it permits community standards to be applied to the value component of the constitutional test. As a result, that statute should be held unconstitutional and the defendants' convictions should be reversed.

Respectfully submitted,

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APPENDIX

First Amendment
Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment
Constitution of the United States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

Illinois Obscenity Statute, Ill.Rev.Stat. 1983, ch. 38, ¶11-20

§ 11-20. Obscenity. (a) Elements of the Offense.

A person commits obscenity when, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Performs an obscene act or otherwise presents an obscene exhibition of his body for gain; or

(5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or

(6) Advertises or otherwise promotes the sale of material represented or held out by him to be obscene, whether or not it is obscene.

(b) Obscene Defined.

A thing is obscene, if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs.

(c) Interpretation of Evidence.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that material is being commercially exploited for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social imporance.

In any prosecution for an offense under this Section evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;

(2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect if any, it would probably have on the behavior of such people;

(3) The artistic, literary, scientific, educational or other merits of the material, or absence thereof;

(4) The degree, if any, of public acceptance of the material in this State;

(5) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

(6) Purpose of the author, creator, publisher or disseminator.

(d) Sentence.

Obscenity is a Class A misdemeanor. A second or subsequent offense is a Class 4 felony.

(e) Prima Facie Evidence.

The creation, purchase, procurement or possession of a mold, engraved plate or other embodiment of obscenity specially adapted for reproducing multiple copies, or the possession of more than 3 copies of obscene material shall be prima facie evidence of an intent to disseminate.

(f) Affirmative Defenses.

It shall be an affirmative defense to obscenity that the dissemination:

(1) Was not for gain and was made to personal associates other than children under 18 years of age;

(2) Was to institutions or individuals having scientific or other special justification for possession of such material.

Amended by P.A. 77-2638, § 1, eff. Jan. 1, 1973.

Illinois Obscenity Statute, Ill.Rev.Stat. 1985, ch. 38, ¶11-20 (effective January 1, 1986)

§ 11-20. Obscenity. (a) Elements of the Offense. A person commits obscenity when, with knowledge of the nature or content thereof, recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Performs an obscene act or otherwise presents an obscene exhibition of his body for gain; or

(5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or

(6) Advertises or otherwise promotes the sale of material represented or held out by him to be obscene, whether or not it is obscene.

(b) Obscene Defined.

Any material or performance is obscene if: (1) the average person, applying contemporary adult community standards, would find that, taken as a whole, it appeals to the prurient interest; and (2) the average person, applying contemporary adult community standards, would find that it depicts or describes, in a patently offensive way, ultimate sexual acts or sadomasochistic sexual acts, whether normal or perverted, actual or simulated, or masturbation, excretory functions or lewd exhibition of the genitals; and (3) taken as a whole, it lacks serious literary, artistic, political or scientific value.

(c) Interpretation of Evidence.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children, or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that material is being commercially exploited for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is lacking in serious literary, artistic, political or scientific value.

In any prosecution for an offense under this Section evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;

(2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect, if any, it would probably have on the behavior of such people;

(3) The artistic, literary, scientific, educational or other merits of the material, or absence thereof;

(4) The degree, if any, of public acceptance of the material in this State;

(5) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

(6) Purpose of the author, creator, publisher or disseminator.

(d) Sentence.

Obscenity is a Class A misdemeanor. A second or subsequent offense is a Class 4 felony.

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The creation, purchase, procurement or possession of a mold, engraved plate or other embodiment of obscenity specially adapted for reproducing multiple copies, or the possession of more than 3 copies of obscene material shall be prima facie evidence of an intent to disseminate.

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It shall be an affirmative defense to obscenity that the dissemination:

(1) Was not for gain and was made to personal associates other than children under 18 years of age;

(2) Was to institutions or individuals having scientific or other special justification for possession of such material.

Amended by P.A. 84-709, § 1, eff. Jan. 1, 1986.

No. 85-1973

Supreme Court, U.S.
FILED
JAN 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RICHARD POPE and CHARLES G. MORRISON,

Petitioners,

vs.

STATE OF ILLINOIS,

Respondent.

On Writ Of Certiorari To The Appellate Court Of Illinois, Second District

BRIEF FOR THE RESPONDENT

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iii
STATEMENT OF FACTS	1
The Morrison Case	2
The Pope Case	4
SUMMARY OF ARGUMENT	6
ARGUMENT:	
I.	
TO ASSURE ACCURATE AND REVIEWABLE JURY DETERMINATIONS OF WHETHER A WORK IS OBSCENE, IT IS NECESSARY TO PROVIDE CLEAR AND UNDERSTANDABLE STANDARDS DEFINING THE CONCEPT OF OBSCENITY, A RESULT BEST ACHIEVED WHEN ALL SUCH STANDARDS ARE EVALUATED ACCORDING TO CONTEMPORARY COMMUNITY STANDARDS	8
A. The Obscenity Determinations Of Prurient Interest, Patently Offensive, And Value Are Not Mere Questions Of Fact, But Mixed Questions Of Law And Fact Or Questions Of Constitutional Judgment	11
B. The "Average Person Applying Contemporary Community Standards" Requirement Of The *Miller* Test Assures An Objective Evaluation Of Whether Material Is Obscene	15

C. Application Of Contemporary Community Standards To All Three Elements Of The *Miller* Test Is Necessary To Promote Reliable Jury Determinations Of Obscenity 18

D. There Is No Danger That Jury Instructions Of The Type Used At Trial Will Result In Purely "Local" Obscenity Determinations 22

E. Too Much Variance In Obscenity Determinations Is Best Checked By Appellate Courts Who Have The Duty In First Amendment Cases To Conduct An Independent Constitutional Judgment 26

II.

PETITIONERS ARE NOT ENTITLED TO REVERSAL WHERE THEY WERE NOT MATERIALLY PREJUDICED BY THE JURY INSTRUCTION TO APPLY COMMUNITY STANDARDS TO THE "VALUE" DETERMINATION; NOR IS THE STATE OBSCENITY STATUTE FACIALLY INVALID SINCE IT CONTAINS NO LANGUAGE THAT WOULD MAKE IT OVERBROAD AND THERE IS NO SHOWING THAT OVERBREADTH WOULD BE SUBSTANTIAL 32

CONCLUSION 36

TABLE OF AUTHORITIES

PAGE

Bose Corp. v. Consumers Union, 466 U.S. 485 (1984) 11, 26, 27, 28, 29, 30, 31

Ginzburg v. United States, 383 U.S. 463 (1966) 13, 14, 28

Glasser v. United States, 315 U.S. 60 (1942) .. 31

Hamling v. United States, 418 U.S. 87 (1974) .. *passim*

Jacobellis v. Ohio, 378 U.S. 184 (1964) 23

Jenkins v. Georgia, 418 U.S. 153 (1974) ... 14, 16, 26, 28

Kaplan v. California, 413 U.S. 115 (1973) 12

Kois v. Wisconsin, 408 U.S. 229 (1972) 8, 28

Manual Enterprises v. Day, 370 U.S. 478 (1962) 11, 26, 28

Marks v. United States, 430 U.S. 188 (1977) .. 32

Maryland v. Munson, 467 U.S. 947 (1984) 34

Memoirs, A Book v. Massachusetts, 383 U.S. 413 (1966) 12

Miller v. California, 413 U.S. 15 (1973) ..... *passim*

Miller v. Fenton, 475 U.S. ____, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985) 30

Mishkin v. New York, 383 U.S. 502 (1966) 15, 17

New York v. Ferber, 458 U.S. 747 (1982) 34, 35

Penthouse Intern., Ltd. v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980) 14, 15, 20, 28, 33

People v. Ridens, 59 Ill.2d 362, 321 N.E.2d 264 (1974) 35

Pinkus v. United States, 436 U.S. 293 (1978) 13, 14, 15, 16, 18

Redrup v. New York, 386 U.S. 767 (1967) 28

Roth v. United States, 354 U.S. 476 (1957) 8, 11, 12, 17, 25

Smith v. United States, 431 U.S. 291 (1977) .... *passim*

Splawn v. California, 431 U.S. 595 (1977) 14, 17

United States v. Bagnell, 679 F.2d 826 (11th Cir. 1982) 20, 23

United States v. Cutting, 538 F.2d 835 (9th Cir. 1976) 18, 23, 33

United States v. Heyman, 562 F.2d 316 (4th Cir. 1977) 9, 20

United States v. Linetsky, 533 F.2d 192 (5th Cir. 1976) 23

United States v. Merrill, 746 F.2d 458 (9th Cir. 1984) 29

United States v. Thomas, 613 F.2d 787 (9th Cir. 1980) 23

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On Writ Of Certiorari To The Appellate Court Of Illinois, Second District

BRIEF FOR THE RESPONDENT

STATEMENT OF FACTS

The Respondent accepts the factual summary contained within Petitioners' brief (pages 3-7) as to the summary of historical events leading to Petitioners' convictions. They submit the following additional facts regarding the procedural history of the case in the Illinois courts.

The Morrison Case

In his pretrial motion to dismiss, Morrison claimed, *inter alia*, that unless judicially construed otherwise, the Illinois obscenity statute was unconstitutional under the First and Fourteenth Amendments for failing to require that the value determination be adjudged on an "objective" basis, rather than pursuant to community standards. (J.A. 6).

At the instruction conference, with regard to the standard of review, the court decided to give to the jury State instruction #12, over objection of petitioner. The instruction described the following standard:

> in determining whether a thing is obscene, you are to consider how it would be viewed by ordinary adults in the whole of the State of Illinois rather than by the people in any single city or town or region within the State.

(Morrison, R. 326, C46; J.A. 11).

Morrison objected that this standard of review did not contain the words "community standards" nor did it forbid the jurors to focus on their personal judgments. (Morrison, R. 218-219). Therefore, the court also gave to the jury petitioner's instruction #1, despite the State's objection that it was repetitive of State instruction #12. This instruction was that:

> you must not judge this material by your own personal standards, even if you are personally offended by the material; rather your verdict must be based on the evidence and testimony presented in this case, and your determination of what the community standards for the State of Illinois with respect to the obscenity or non-obscenity of the material are.

(Morrison, R. 326, C49; J.A. 12).

This was one of several instructions tendered by defendant that proposed a state-wide standard. (Morrison, R. C48-C67). Morrison tendered no instruction referring to or defining a nationwide standard. (Morrison, R. C48-C67). He did, however, tender several instructions, #3, #5, and #6, under which the "prurient interest" and "patently offensive" elements would be considered in terms of community standards, but the value element would be standardless. (Morrison, R. C53, C57, C59; J.A. 14).

At closing argument, the prosecution asked the jury to look at the magazines as ordinary adults would in the State of Illinois and to follow the obscenity test even if shocked by the magazines. (Morrison, R. 307, 316). Similarly, the petitioner asked the jury to disregard its personal feelings but determine the sense of the average adult in Illinois based on the evidence he presented of a state-wide poll indicating a growing tolerance for sexually explicit materials, as well as his evidence that these materials are available in communities throughout the State. (Morrison, R. 311-315).

In his post-trial motion, Morrison claimed that the court erred in giving State instruction #12 and in refusing his instruction #5, alleging that the jury was incorrectly instructed on the correct nature and application of the tripartite test of obscenity in violation of the First and Fourteenth Amendments. (J.A. 15).

On direct appeal, the Appellate Court of Illinois rejected Morrison's claim on the merits, saying only that this Court has never held that the value element may not be determined in accord with contemporary community standards.

The Pope Case

In his pretrial motion to dismiss Pope, like Morrison, claimed *inter alia* that, unless judicially construed otherwise, the Illinois obscenity statute was unconstitutional for failing to require that the value determination be adjudged on an "objective" basis, rather than pursuant to community standards, in violation of the First and Fourteenth Amendments. (J.A. 20).

At the instruction conference, with regard to the standard of review, the court refused the State's instruction #9 which stated that:

> in determining whether a thing is obscene, you are to consider how it would be viewed by ordinary adults in the whole State of Illinois rather than by the people in any single city or town or region within the State.

(Pope, R. 308, 360).

Instead, the court gave to the jury petitioner's instruction #2 which stated that:

> in determining whether a thing is obscene, you must not judge it by your own personal standards, even if you are personally offended by the material. Your verdict must be based on the evidence and testimony in this case and your determination of community standards for the State of Illinois; that is, how the magazine would be viewed by ordinary adults in the whole state rather than by the people in any single city or town or region within the State.

(J.A. 25-26; Pope, R. 308).

This was one of several instructions tendered by petitioner that proposed a state-wide standard. (Pope, R. C65, C69). Pope tendered no instruction referring to or defining a nation-wide standard. (Pope, R. C64-C71). Nor did

he, unlike Morrison, tender instructions under which the "prurient interest" and "patently offensive" elements would be considered in terms of community standards, but the value element would be standardless. (Pope, R. C64-C71).

At closing argument, the prosecution urged the jury to rely on everyday principles of common sense and its day-to-day experiences in life, cautioning against personal feelings and asking the jury to resolve the obscenity determination as ordinary adults applying contemporary standards in the State of Illinois. (Pope, R. 318, 319-320, 323-325, 342). Similarly, the petitioner asked the jury to determine community standards as ordinary adults, mindful of all citizens throughout the State. (Pope, R. 328, 333). He emphasized that community standards apply to all three elements of the obscenity definition. (Pope, R. 336).

In his post-trial motion, Pope, unlike Morrison, did not claim that the court improperly instructed the jury on the correct nature and application of the contemporary community standards to the value element of obscenity in violation of the First and Fourteenth Amendments. (J.A. 27).

On direct appeal, the Appellate Court of Illinois rejected Pope's claim on the merits, again on the basis that this Court has never held that the value element may not be determined in accord with contemporary community standards. The State of Illinois made no contention in the Illinois Appellate Court that the claim was not properly preserved.

SUMMARY OF ARGUMENT

This Court should reject the mistaken notion that the third element of this Court's obscenity definition, whether a work has serious value, must somehow be measured by a different standard than the first and second elements of that definition.

Determinations that a work appeals to prurient interest, that it is patently offensive, and lacks serious literary or artistic value, are essentially determinations of fact, albeit facts with constitutional significance. These factual determinations as to each element of the obscenity definition coalesce to form the obscenity determination, and logically each element should be measured by a consistent standard. Historically, that standard has required the trier of fact to measure each element according to contemporary community standards.

By requiring the trier of fact to determine obscenity according to contemporary community standards this Court has fostered the central requirement of the First and Fourteenth Amendments, that obscenity be decided in an objective fashion. The trier of fact is thereby precluded from assessing whether a work is obscene to the unusually susceptible or sensitive viewer, and requires the fact-finder to apply a "reasonable person" standard. Thus, this Court does not evaluate jury determinations of obscenity according to the geographic size of the community whose standards are applied to measure whether a reasonable person would consider a work to be obscene. Rather, precedent requires that such community standards be evaluated under the "reasonable person" test.

Application of the "reasonable person" test according to contemporary community standards promotes accuracy in jury determinations of obscenity. By applying the same standards to each of the three elements of obscenity, jurors are able to utilize a consistent method of judgment based on a fixed point of reference, one which is readily understood and applied and which is subject to proof by extrinsic evidence. Further, application of contemporary community standards to the obscenity question also facilitates thorough appellate review by courts located within the specific community whose contemporary standards are being applied.

The Respondent's position poses no realistic threat that obscenity determinations will become so parochial as to chill legitimate expression. The precedent of this Court provides uniform, national precepts to govern how States may determine obscenity. Further, the required process of *de novo* appellate review for all determinations of obscenity substantially lessens the possibility of aberrant results. While there may be some discrepant results on the obscenity determination among various jurisdictions, these results do no violence to the First Amendment principles, but are the necessary product of a diverse union of states and the nature of the jury system itself. The First Amendment simply does not impose rigid requirements of uniformity among jurisdictions with varying *mores* and values.

Finally, petitioners' convictions are not entitled to reversal where they were not materially prejudiced by their jury instructions. Clearly, they had the benefit of the objective, average person test, not the unconstitutional subjective, personal test. Moreover, the Illinois statute is not facially invalid since it does not itself contain language defining what standard governs the value determination nor does it chill protected speech in any substantial way.

ARGUMENT

I.

TO ASSURE ACCURATE AND REVIEWABLE JURY DETERMINATIONS OF WHETHER A WORK IS OBSCENE, IT IS NECESSARY TO PROVIDE CLEAR AND UNDERSTANDABLE STANDARDS DEFINING THE CONCEPT OF OBSCENITY, A RESULT BEST ACHIEVED WHEN ALL SUCH STANDARDS ARE EVALUATED ACCORDING TO CONTEMPORARY COMMUNITY STANDARDS.

As the dissemination of sexually explicit pornography increased during recent decades, the States increasingly required guidance from this Court for their efforts to combat such obscene works without transgressing cherished First Amendment principles. The Court did much to provide such guidance with its decision in *Miller v. California*, 413 U.S. 15 (1973). In *Miller*, a majority of the Court approved a three-point test for defining which type of expression may be condemned as "obscene":

> The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin*, *supra*, at 230, quoting *Roth v. United States*, *supra*, at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

413 U.S. at 24.

Although *Miller* did indeed offer "basic guidelines for the trier of fact" by creation of the tripartite test quoted above, it did not completely define the standard of review to be utilized in deciding each segment of the test. The

decision expressly addressed the first two segments, holding that juries could decide whether a work appealed to the "prurient interest" and whether it did so in a "patently offensive way" by "applying contemporary community standards." *Id.* The majority discussed these elements as being "essentially questions of fact", similar to factual questions decided by juries in a wide range of litigation contexts. 413 U.S. at 30. In allowing such questions to be determined according to contemporary community standards, the Court observed "it would be unrealistic to require that the answer be based on some abstract formulation." *Id.*

Notwithstanding the undeniable need for a discernible standard for which jurors can evaluate allegedly obscene works, the *Miller* decision devoted substantially less attention to the third segment of the test: whether the work has serious literary, artistic, political or scientific value (the value element). No distinct effort was made to label the value element as a factual issue, nor did the *Miller* opinion expressly include value as an issue to be decided according to contemporary standards.

This omission was noted, but not examined or explained, in a subsequent obscenity decision of this Court, *Smith v. United States*, 431 U.S. 291, 301 (1977). Moreover, the omission itself, and *Smith*'s mention of it, had led some lower courts to conclude that the third element of the *Miller* test, the value element, is to be treated differently than segments one and two. *See, e.g., United States v. Heyman*, 562 F.2d 316 (4th Cir. 1977). Petitioners have also seized upon this omission and now urge that value must not be determined according to contemporary community standards, as are prurient appeal and patent offensiveness. Rather, they proffer value as being amenable to an "objective" standard of review. (Pet. Br. at 28).

Respondent, the State of Illinois, urges this Court to reject this notion. Juries deciding the difficult questions attendant to an obscenity prosecution require, and are entitled to, a specific and ascertainable standard of review. Moreover, that standard should logically be uniform as to all three elements of the *Miller* test for obscenity, to enable consistency in jury evaluations. In deciding which standard should therefore apply, this Court should be mindful that the American criminal justice system "has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law." *Miller*, 413 U.S. at 30.

Petitioners' proffer of an "objective" standard is illusory; it offers no standard at all. Indeed, this Court has stressed that all three of the *Miller* elements must be "objective", in that obscenity is a concept decided by reference to a "reasonable person" standard, not by reference to a particularly sensitive or susceptible person or group. *See, e.g.*, *Miller*, 413 U.S. at 33. Petitioners' efforts to create a different standard of review on the value element are contrary to this Court's recognition that the individual States should be free to treat obscene works in a fashion consistent with the *mores* of their own jurisdiction, and his proposals ultimately seek to further complicate the sophisticated jury determinations which must be made in every obscenity prosecution in order to honor the dictates of the First Amendment. This result is certainly undesirable, and it is not required in order to effectuate the constitutional commands of free speech and expression.

A. The Obscenity Determinations Of Prurient Interest, Patently Offensive, And Value Are Not Mere Questions Of Fact, But Mixed Questions Of Law And Fact Or Questions Of Constitutional Judgment.

In an obscenity action, the determination of a material's value rests with the trier of fact in the same manner as the determination of a material's "prurient interest" and "patent offensiveness." *Miller*, 413 U.S. at 24. And yet these three determinations are not merely the kind of pure historical fact questions traditionally decided by triers of fact. Rather, they require the trier of fact to make a judgment that is dispositive of the ultimate constitutional question of obscenity.

Thus, they are recognized, not really as questions of fact, but questions of constitutional judgment of the most sensitive and delicate kind. *Roth v. United States*, 354 U.S. 476, 497-498 (1957) (Harlan, J., concurring and dissenting opinion). They have been described as the kinds of mixed questions of law and fact that reviewing courts can resolve just as competently as triers of fact, *Bose Corp. v. Consumers Union*, 466 U.S. 485, 517, n.1 (1984) (Rehnquist, J., joined by O'Connor, J., dissenting opinion). They are "factual matters entangled in a constitutional claim." *Manual Enterprises v. Day*, 370 U.S. 478, 488 (1962).

Therefore, while the jury's role in the obscenity determination is important, the stakes, in terms of impact on future cases and future conduct, are too great to entrust them finally to the judgment of the trier of fact. *Bose*, 466 U.S. at 501, n.17. The jury's role has thus been tempered by the standard of review described as the "average person in the community" and by the power of the reviewing court to conduct independent review. *Miller*, 413 U.S. at 25.

Logically, each of the three obscenity determinations should be made by the trier of fact in the same manner. This Court has consistently held that obscenity is to be determined according to the average person applying contemporary community standards. *Smith v. United States*, 431 U.S. 291, 304 (1977); *Miller v. California*, 413 U.S. 15, 37 (1973); *Hamling v. United States*, 418 U.S. 87 (1974); *Roth v. United States*, 354 U.S. 476 (1957); *Kaplan v. California*, 413 U.S. 115, 121 (1973). This principle has never limited community standards to specific elements of the definition but intends its application to the entirety of the definition.

This intention was expressed in *Memoirs, A Book v. Massachusetts*, 383 U.S. 413 (1966) where this Court first fashioned the tripartite test, consisting of the first "prurient interest" element, the second "patently offensive" element, and a third, more stringent "utterly without value" element. Obscenity itself was defined in terms of the average person applying contemporary community standards and "under this definition . . . [the] three elements must coalesce." *Memoirs*, 383 U.S. at 418. If obscenity itself is a community determination, each of the three elements which "coalesce" to form its definition must also be judged by community standards.

This rule could not be questioned today except for the ambiguity contained in *Miller* and noted in *Smith*. In neglecting to discuss the value element—which it had since reformulated to "serious literary, artistic, political, or scientific value"—in terms of community standards, *Miller* and *Smith* planted the seed for petitioners' argument that this element is a unique one in the obscenity determination, not subject to community standards.

However, neither *Miller* nor *Smith* suggested any deviation from the rule that obscenity is to be determined by

applying community standards. These cases never suggested that the obscenity question was a hybrid composed of two parts community standards and a third part something else. On the contrary, in *Miller* the Court iterated the rule that obscenity itself was a community determination, and then refined it, laying to rest the idea that the "community" had to be the "nation." *Miller*, 413 U.S. at 37. In *Smith*, the Court remained steadfast to the rule, emphasizing that "the Court has never varied from the *Roth* position that the community as a whole should be the judge of obscenity." *Smith*, 431 U.S. at 300-301, n.6, and at 304.

Nor did *Miller* or *Smith* suggest that the value element was an exceptional question for the jury to answer in making the obscenity determination. The third value element was included as one question, along with the "prurient interest" and "patently offensive" questions, that was to be presented to and resolved by the trier of fact. *Miller*, 413 U.S. at 24. Since contemporary community standards take on meaning with reference to the underlying questions of fact that must be resolved by the trier, *Smith*, 431 U.S. at 300, they must necessarily take on meaning as to the value fact question.

Certainly the value element is just as much a fact question as the "prurient interest" and "patently offensive" elements. It is equally amenable to proof by way of evidence. For instance, this Court has noted that evidence of "pandering" is relevant to all three elements, including the question whether expression has serious literary, artistic, political, or scientific value. Pandering is the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers. *Pinkus v. United States*, 436 U.S. 293, 303 (1978); *Ginzburg v. United States*, 383 U.S. 463, 467 (1966). If there

is any claim that material has serious value, the question of whether it was pandered—deliberately promoted by the disseminator as erotically arousing—is relevant to whether that claim is pretense or reality, that is, whether it was the basis why the material was traded in the marketplace or whether it is a spurious claim for litigation purposes. *Ginzburg*, 383 U.S. at 470; *Splawn v. California*, 431 U.S. 595, 598-599 (1977). Evidence of whether the publisher emphasized titillation or saving intellectual content can help the trier of fact determine whether the material has any serious value. *Ginzburg*, 383 U.S. at 470; *Splawn*, 431 U.S. at 598-599; *Memoirs*, 383 U.S. at 420; and *see Pinkus*, 436 U.S. at 303; *Hamling*, 418 U.S. at 598.

The existence of awards and citations may also be relevant to the value element. In *Jenkins v. Georgia*, 418 U.S. 153, 158, 161 (1974), this Court, after considering evidence that the movie "Carnal Knowledge" appeared on many "Ten Bests" lists for 1971, that it received favorable reviews, and that an actress received an Academy Award nomination for her performance in the picture, concluded that the "patently offensive" element was not met.

But this same evidence is also relevant to the trier of fact's assessment of a material's serious value. For instance, in *Penthouse Intern., Ltd. v. McAuliffe*, 610 F.2d 1353, 1372 (5th Cir. 1980), the Fifth Circuit interpreted *Jenkins* as indicating that these awards and citations also showed that the movie had serious value and that similar distinctions applicable to magazines such as "Playboy" and "Penthouse" could indicate serious value as well. Thus, it was relevant that: "Penthouse" and its editor had received awards from Columbia University School of Journalism, the Overseas Press Club, and Brandeis University; "Penthouse" had a very large annual worldwide circulation; "Playboy" had a large monthly circulation, had been

published since 1953, and its subscribers included 950 libraries in the United States; and both magazines attract advertising by national concerns. This evidence could support the contention that the materials possessed serious value. *Penthouse Intern.*, 610 F.2d at 1372.

Thus, the decision by the State of Illinois to instruct its juries that obscenity must be determined pursuant to each member's perception of the average person applying contemporary community standards, is made in reliance on the decisions of this Court. These same decisions support the decision to instruct juries that community standards apply to each of the three factual questions that "coalesce" to form the obscenity definition. It is only logical that the value determination should be made in the same manner as the "prurient interest" and "patently offensive" determinations.

B. The "Average Person Applying Contemporary Community Standards" Requirement Of The *Miller* Test Assures An Objective Evaluation Of Whether Material Is Obscene.

The Respondent's position herein is premised on this Court's explanation of what purpose the community standard serves. The standard of the "community" was developed to assure that the obscenity judgment be made on the basis of the average person applying contemporary standards. *Hamling*, 418 U.S. at 107; *Pinkus v. United States*, 436 U.S. 293, 300 (1978). The concept originated in *Roth* to serve the essentially negative purpose of expressing the Court's rejection of a test focusing on susceptible, rather than average, persons. *Mishkin v. New York*, 383 U.S. 502, 508-509 (1966). Its principle function is to protect First Amendment values by assuring that a trier of fact will not indulge his own personal and

private views in resolving the obscenity definition. *Pinkus*, 436 U.S. at 300; *Smith*, 431 U.S. at 305; *Hamling*, 418 U.S. at 107. Rather, under the standard of the community, the juror must draw on his knowledge of the characteristics and differing attitudes in the community or vicinage from which he comes, in deciding what conclusion the average person applying contemporary community standards would reach. *Hamling*, 418 U.S. at 104. This standard is intended to function much the same as the "reasonable man" standard used for generations in other contexts. *Pinkus*, 436 U.S. at 300; *Smith*, 431 U.S. at 302; *Hamling*, 418 U.S. at 104-105. These standards of the "reasonable man" and the "community" are very similar in that neither lends itself to precise definition. *Smith*, 431 U.S. at 308.

Thus, the size of the average person's community is not important. No precise geographic area of the "community" has ever been required. *Hamling*, 418 U.S. at 105. A State may direct the jury to apply community standards without specifying what that community is, as Georgia did in *Jenkins*, 415 U.S. at 157. But if the State wants to specify a community, it could be as small as the area from which the jury is drawn, *Smith*, 431 U.S. at 303; *Hamling*, 418 U.S. at 105; it could be statewide like California's, *Miller*, 413 U.S. 31; or it could be larger than the jury's general vicinage; *Hamling*, 418 U.S. at 105-106. The trial court has discretion to allow evidence of community standards outside the vicinage of this would assist the jury's determination. *Hamling*, 418 U.S. at 106. Moreover, this Court has left open the question that the State could make the standard of review a national community. It explained that *Miller* did not forbid a national community standard, but only said that the States could not be compelled to adopt a national standard. *Smith*, 431 U.S. at 304, n.11.

Therefore, it is not the concern of federal reviewing courts to wrangle over the State's geographic delineation of the average person standard since this is not a constitutional matter. This Court has explained that, unlike its broad authority to review instructions in obscenity prosecutions under federal statutes, federal reviewing courts can upset state court convictions by reason of instructions given in the course of a trial only if the instruction renders the subsequent conviction violative of the United States Constitution. *Splawn*, 431 U.S. at 599. In the obscenity context, the Constitution is violated only if there is an indication that the trier of fact failed to apply "average" standards.

For instance, in *Hamling*, the trial court instructed the jury in a federal obscenity prosecution to judge the obscenity *vel non* of a brochure by reference to the contemporary community standards generally held throughout this country. *Hamling*, 418 U.S. at 103. This Court determined that the reference to the community standards of the nation as a whole delineated a wider geographical area than was warranted under *Miller*; but defendant was not materially prejudiced since the reason the Constitution requires application of contemporary community standards is to assure that the material is judged, neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group. *Hamling*, 418 U.S. at 107; *Miller*, 413 U.S. at 33; *Mishkin*, 383 U.S. at 508-509; *Roth*, 354 U.S. at 489. The trial court's instruction, including its reference to the nation as a whole, "undoubtedly accomplished this purpose." *Hamling*, 418 U.S. at 107.

This same "average" standard was accomplished in a federal obscenity action in *Pinkus*, even though the jury was told that, in arriving at the standard of the average

person in the community, it must include the sensitive and the insensitive. *Pinkus*, 436 U.S. at 299. This Court said that the trier may not indulge a sensitive or insensitive viewpoint, but he need not ignore it in assessing an average viewpoint. *Pinkus*, 436 U.S. at 300.

Clearly, if a trier of fact receives the instruction to sit as an average person to determine the collective view of the community as best as he can, and if, on the record, there is no indication that the trier was influenced, either by the judge or by counsel during argument, to focus on sensitive persons or groups or on his private views, First Amendment values are safeguarded. *Hamling* and *Pinkus* show that these values are jeopardized only where the record indicates that the jury applied a specialized test that might differ, to the defendant's disadvantage, from a generalized "average person in the community" test. *See also United States v. Cutting*, 538 F.2d 835, 841 (9th Cir. 1976).

Therefore, it is the State's constitutional task to ensure that the jurors do not approach the obscenity question with their own personal predilictions or sensitive viewpoints but sit as average persons applying contemporary community standards. The States are free to decide how to best to assure this result.

C. Application Of Contemporary Community Standards To All Three Elements Of The *Miller* Test Is Necessary To Promote Reliable Jury Determinations Of Obscenity.

As previously discussed, the *Miller* test contemplates that what is essentially a question of fact (whether a work has serious value) will be decided by juries using a reasonable-person analysis based upon contemporary community standards. Petitioners attempt to dispute these proposi-

tions by urging that an "objective" standard must govern the value element, even though they never explain precisely what that standard is or how it is different from the standard of any particular community. Petitioners decry the possibility that "jurors [will] receive mixed signals about the role community standards plays (sic) in the definition of obscenity" (Pet. Br. at 27) even as they urge that these signals be mixed even further by inclusion of a second standard of review. Petitioners express concern that sexually explicit materials will be suppressed by "an asserted majority of citizens" (*id.*), thereby ignoring this Court's oft-stated view that individual States are entitled to combat pornography in a fashion reflective of local community standards, standards which obviously must derive from the majority views as to what types of sexually explicit works are deemed objectionable.

What Petitioners seemingly fail to appreciate is that this Court intends to effectuate First Amendment freedoms, not by specifying the sheer size of the geographic community from which community standards are drawn, but by the requirement that all community standards be assessed on an objective, "reasonable person" basis. (See section B, *supra*). Significantly, this Court has always declined invitations to require "national standards" for evaluating obscenity, primarily because of legitimate doubts as to whether such a standard could ever be formulated so as to aid the trier of fact. *Miller*, 413 U.S. at 32; *Hamling*, 418 U.S. at 105.

Therefore, while it may well be true that any differences between a local community standard of value and a purported national standard are "gossamer" (*Hamling*, 418 U.S. at 109) there is still a vital function to be served by instructing jurors that they should evaluate the serious value of a work by using contemporary local community

standards. That function, of course, is to provide the juror with a known and ascertainable frame of reference by which the serious value of a work may be measured. Local community standards permit the individual juror to fix a point of reference in making this judgment, with the substantial collateral benefit of facilitating the task of state appellate courts which must review such verdicts.

Indeed, the Respondent is unable to define what exactly is meant by an "objective standard" if it differs significantly from the standards applied to the first and second parts of the *Miller* test. Petitioners carefully refrain from terming it a "national" standard, they obviously reject the idea that it is a local community standard, and neither party desires a standard premised upon the personal, subjective attitudes of a given juror. It would appear that Petitioners suggest merely a standardless value determination.

In fact, the authority relied on by Petitioners appears to suggest just that. While this authority theorizes that in applying the first two elements the trier of fact must utilize contemporary community standards, but in applying the third element the trier of fact may not rely on contemporary community standards, no case cited by Petitioners articulates what standard should govern the third value element. *United States v. Bagnell*, 679 F.2d 826, 835 (11th Cir. 1982); *United States v. Heyman*, 562 F.2d 316, 318 (4th Cir. 1977); *Penthouse Intern., Ltd. v. McAuliffe*, 610 F.2d 1353, 1363 (5th Cir. 1980). The cases purport to rely on *Smith*, but *Smith* never went so far as to hold that the value determination—unlike the other two determinations—should be standardless. *Smith*, 431 U.S. at 301. Rather, *Smith* left the question unaddressed, stating only that:

> Literary, artistic, political, or scientific value, on the other hand, is not discussed in *Miller* in terms of contemporary community standards.

Smith, 431 U.S. at 301.

The State of Illinois maintains that the value determination should not be standardless. Such an interpretation would assign to the trier of fact a very confusing task: a juror would be told to sit as a local average person, drawing on his own experience of everyday life in the community, in assessing the first two elements of obscenity, but when he assesses the third element, he would not be told that he may sit as a local average person, drawing on his own experience of everyday life in the community. Under the standardless approach, he has no idea *how* he must sit in determining the value of expression. Ultimately, the juror can do no more than resort to his knowledge and experience of life. In other words, he will bring to the value determination the same sense that he brings to "prurient interest" and "patently offensive" elements; as a practical matter, the juror must be

> entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a "reasonable" person in other areas of law.

Smith, 431 U.S. at 302.

In the final analysis, Respondent admits of the possibility that sexually explicit expressions in a given work are wholly deserving of First Amendment protection, that the inherent value of a work removes it from the ambit of what is obscene. Illinois is not bent on suppressing "vigorous and robust sexual debate" (Pet. Br. at 24), although it entertains grave doubt as to whether magazines

entitled "Anal Animal" or "Fuck Around" are contributors to any meaningful or legitimate social discourse in the realm of human sexuality. Respondent seeks only its sovereign right to permit the citizens of Illinois to act as objective arbiters of contemporary community standards, and to permit the appellate courts of Illinois to review obscenity determinations with the benefit of their own perspective of those same standards. Importation of an amorphous, undefined "objective" standard as to the serious value of a particular work entirely defeats those sovereign rights, replacing them with standardless analyses which can only detract from the reliability of obscenity convictions secured in any given State.

D. There is No Danger That Jury Instructions Of The Type Used At Trial Will Result In Purely "Local" Obscenity Determinations.

This Court has no need to save First Amendment values from local parochialism. It fashioned the test that protects First Amendment values in *Miller*. Everywhere in this nation, a trier of fact in an obscenity action must adhere to the fixed, uniform, national *Miller* definition in determining whether expression is obscene. In so doing, the juror is entitled, as in any case, to draw on his experience in everyday life and reach the common conscience of the community. This is consistent with First Amendment values.

People in different States vary in their tastes and attitudes. *Miller*, 413 U.S. at 33. The First Amendment does not operate to strangle this diversity with the absolutism of imposed uniformity. *Miller*, 413 U.S. at 33. It does not require that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City. *Miller*, 413 U.S. at 32. It does not ordain a national sameness.

Thus, this Court adopted Chief Justice Warren's position that, while the "community" approach may at times result in material being proscribed as obscene in one community but not in another, the communities throughout the Nation are in fact diverse and the freedoms of the communities to experiment and choose for themselves within our society are to be reconciled with the rights of individuals. *Miller*, 413 U.S. at 32; *Hamling*, 418 U.S. at 107; *Jacobellis v. Ohio*, 378 U.S. 184, 200-201 (1964) (Warren, J., dissenting opinion).

On this authority, the intermediary reviewing courts have described obscenity as "contextual," in that differences in the contemporary standards of different communities create different conclusions as to obscenity. *United States v. Thomas*, 613 F.2d 787, 791 (9th Cir. 1980). The community standards test results in application of local attitudes, *United States v. Cutting*, 538 F.2d 835, 841 (9th Cir. 1976), assures a degree of diversity, *United States v. Linetsky*, 533 F.2d 192, 201 (5th Cir. 1976), and reflects the various degrees of tolerance throughout the country. *United States v. Bagnell*, 679 F.2d 826, 836 (11th Cir. 1982).

Clearly, the First Amendment contemplates a certain amount of local variety in determining what kind of expression is constitutionally unprotected. It has no goal to homogenize expression in a Nation as large and diverse as ours. But even if that were a worthy goal under the First Amendment, application of a national standard or any type of "objective" standard to the third value element would do little to achieve it.

For instance, in *Miller*, this Court rejected the argument, raised again by Petitioners now, that a local community standard would run the risk of preventing dissemination of materials in some places because sellers would

be unwilling to risk criminal conviction by testing variations in standards from place to place. *Miller*, 413 U.S. at 32, n.13. It saw that the argument could easily be turned around—a national standard would run the risk that materials found acceptable in some places would nonetheless be unavailable in these places under a national average person criterion. *Miller*, 413 U.S. at 32, n.13. In terms of any danger to free expression, the potential for suppression of protected speech is at least as great in the application of a single nationwide standard as in allowing dissemination in accordance with local tastes. *Miller*, 413 U.S. at 32, n.13. Efforts by a State to establish a more liberal, relaxed policy for sexually explicit communication than the nation as a whole could be thwarted. In the States that do not proscribe obscenity, a national standard could inspire uncertainty in publishers or disseminators. If this should result in substantial chilling, the people in these more relaxed communities where obscenity is not proscribed will nonetheless be "protected" from expression determined obscene in far away communities on the premise that all average citizens, not just those in the far away community, would find certain expression obscene.

Moreover, neither a national standard nor a standardless determination would itself eliminate the discrepant determinations that could discourage protected speech. For instance, discrepant determinations are an unavoidable product of the jury system, even on like facts and law. In the marginal obscenity cases, it is often difficult to determine the side of the line on which a particular fact situation falls. *Hamling*, 418 U.S. at 114-11[illegible]; *Miller*, 413 U.S. at 27, n.10. But the mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged. *Hamling*, 418 U.S. at 101;

Miller, 413 U.S. at 26, n.9. The common experience that different juries may reach different results is one of the consequences we accept under our jury system. *Hamling*, 418 U.S. at 101; *Miller*, 413 U.S. at 26, n.9; *Roth*, 354 U.S. at 492, n.30.

Nonetheless, in resolving the sensitive questions in this area of law, we continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide, as we do with rape, murder, and a host of other offenses against society and individuals. *Miller*, 413 U.S. at 26. One of these other protective features is *voir dire*, which provides the chance to glimpse the "parochial" nature of potential jurors. For instance, in the present cases, veniremen were asked about their contacts outside their local community, where else they had lived, where they had traveled, their contact with out-of-town newspapers, national publications, and cable television, their military and educational background, and their affiliation with any religious or social groups that have taken a public stance on obscenity. (Pope, R. 2-172; Morrison, R. 16-77). In this way, citizens who could be fair and impartial because they have the experience to sit as "average" persons, rather than as "sheltered" or parochial persons, could be discerned and chosen.

Additionally, localized obscenity determinations may inevitably surface under the nature of our criminal justice system whereby some States have no obscenity legislation and others subject disseminators to various degrees of criminal liability. *See Hamling*, 418 U.S. at 106. While this must certainly affect the decision of whether or not to disseminate possibly protected expression in a given area, again, it does not mean that constitutional rights are abridged; this again is one of the consequences we

accept under our criminal justice system which is safeguarded by the protective features just discussed.

Thus, the community standard will generate some measure of local, parochial determinations that might chill expression possibly protected in other areas, but the First Amendment tolerates this. In any event, danger to free expression is just as great under a national standard which could preclude expression from areas that would tolerate it under a community standard. But neither standard can eliminate disparate determinations which might chill protected expression where this variance inheres in our jury system and our system of justice.

E. Too Much Variance In Obscenity Determinations Is Best Checked By Appellate Courts Who Have The Duty In First Amendment Cases To Conduct An Independent Constitutional Judgment.

This Court has adhered to the rule that First Amendment values are protected, not just by confining State offenses within the tripartite limitations, but by the ultimate power of the reviewing court to conduct independent review of the constitutional claim when necessary. *Miller*, 413 U.S. at 25; *Jenkins*, 418 U.S. at 161; *Manual Enterprises*, 370 U.S. at 438. Interestingly, the utility of this rule in an obscenity action was best and amply explained by this Court in a defamation action, *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984).

In *Bose*, this Court scrutinized the obligation of the reviewing court in all First Amendment cases to make an independent *de novo* examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression. This constitutional obligation of independent review is one that may not be delegated to the trier of fact. It is in-

voked in every case involving speech that might fall outside constitutional protection: libelous speech, fighting words, incitement to riot, obscenity, and child pornography. *Bose*, 466 U.S. at 499-504.

Bose explained that in each of these areas, the reviewing judges have defined the constitutional limits and character of the unprotected expression by evaluating the special facts that in their judgment have constitutional significance. Then in each of these cases, the reviewing judges have conducted independent review of the record; first, to be sure that the speech in question actually falls within the definition, and second, to keep the definition confined within narrow limits so that protected expression is not inhibited.

Providing triers of fact with a general description of the type of communication whose content is unworthy of protection cannot, in and of itself, serve to narrow the category nor can it eliminate the danger that decisions by triers of fact may inhibit protected expression. The requirement of viewpoint neutrality that underlies the First Amendment imposes a special responsibility on judges whenever it is claimed that expression is unprotected. *Bose*, 466 U.S. at 505. Therefore, when it comes to certain factual questions in the area of the First Amendment, the stakes—in terms of impact on future cases and future conduct—are too great to entrust them finally to the judgment of the trier of fact. *Bose*, 466 U.S. at 501, n.17.

In each of the First Amendment areas, judges have traditionally exercised independent judgment. It has never been the case that a jury finding of obscenity *vel non* is insulated from review so long as the jury was properly instructed and there is some evidence to support its finding. Rather, by adhering to independent *de novo* review, the reviewing court fulfills a judicial function that is "law

in its purest form under our common law heritage," necessary to preserve the precious liberties established and ordained by the Constitution. *Bose*, 466 U.S. at 510.

Independent *de novo* review is the best and most potent check against "parochial" jury determinations. Reviewing courts, including this Court, have depended on it to champion First Amendment values. It worked in *Jenkins* where this Court viewed for itself the motion picture "Carnal Knowledge" and determined, contrary to the jury finding, that the film did not depict sexual conduct in a "patently offensive" way. *Jenkins*, 418 U.S. at 159-161. It worked in *Kois v. Wisconsin*, 408 U.S. 229, 232 (1972), where this Court viewed for itself an underground newspaper and determined, contrary to the trier of fact's finding, that the newspaper did not appeal to a dominant theme of "prurient interest." (*See also Penthouse Intern.*, 610 F.2d at 1364). It worked in *Manual Enterprises*, where this Court viewed for itself certain magazines and photographs and determined, contrary to the trier of fact's finding, that they were not "patently offensive." *Manual Enterprises*, 370 U.S. at 482. And finally, it worked in *Ginzburg*, where this Court viewed for itself the book "Fanny Hill" and determined, contrary to the trial judge's finding, that the book was not obscene. *Ginzburg*, 383 U.S. at 470.

Certainly this Court has no desire to return to the discredited system followed after *Redrup v. New York*, 386 U.S. 767 (1967), requiring the Court to accept each obscenity case for an *ad hoc* determination of whether a work was protected by the First Amendment. But the examples listed above do illustrate that appellate courts of review are competent to assess the First Amendment values of a given work, notwithstanding lower court jury verdicts on the same issue. Further, Respondent stresses again

that appellate review is facilitated when a state court of review is required to assess whether a work offends state community standards. Moreover, as to the value element of the *Miller* test, it should be noted that this Court has characterized this element as being particularly amenable to appellate review. *Smith*, 431 U.S. at 305. In any event, *Ginzburg* demonstrated that review of the "ultimate" question of obscenity may be based upon all three *Miller* elements. *Ginzburg*, 383 U.S. at 470.

Nonetheless, petitioners suggest that the rule of independent review is limited. Their premise is that application of local standards to the first two elements necessarily restricts a reviewing court's ability to review these findings because of its unfamiliarity with standards in that particular community. Meaningful review is available only for the third element, and then only if it is not tied to community standards. In support, petitioners rely on a gradational system of review, developed by the Ninth Circuit in purported reliance of *Bose*, whereby the first element is subject to limited review, the second element slightly broader review, and the third element more extensive review. *United States v. Merrill*, 746 F.2d 458, 463-464 (9th Cir. 1984).

But *Bose* never contrived such a system; in fact, the whole point of *Bose* was to reject such a system. *Bose* held that the standard set out in Rule 52(a) of the Federal Rules of Civil Procedure, under which findings of fact may not be set aside unless clearly erroneous, could not, in First Amendment cases, suspend an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of fact and law. *Bose*, 466 U.S. at 501. Regardless of the jury's function, the constitutional problem in the last analysis is a judgment which appellate courts must make for themselves. *Bose*, 466 U.S. at 506, n.25.

This rule rests on a crucial distinction ignored by petitioners and by the Ninth Circuit in *Merrill*. When the issue involves the credibility of witnesses and turns largely on an evaluation of demeanor, there are compelling and familiar justifications for leaving the process of applying law to fact to the trial court and according its determinations presumptive weight. *Miller v. Fenton*, 475 U.S. ____, 106 S.Ct. 445, 452, 88 L.Ed.2d 405, 414 (1985). But where the relevant legal principles can be given meaning only through its application to the particular circumstances of the case, this Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law. *Miller*, 475 U.S. ____, 106 S.Ct. at 452, 88 L.Ed.2d at 413. Obviously, use of a gradational system of review in obscenity cases, providing deference to "factual" findings as to prurience and patent offensiveness that are dispositive of the ultimate legal question, conflicts with *Bose*'s adherence to independent, *de novo* appellate review. All three of the obscenity elements are equally amenable to *de novo* appellate consideration. As Justice Rehnquist, joined by Justice O'Connor, explained in *Bose*, appellate courts are perhaps just as competent as triers of fact to make determinations about whether material appeals to "prurient interests," whether it depicts sexual conduct in a "patently offensive" way, and whether the material lacks serious artistic value. *Bose*, 466 U.S. at 517, n.1 (dissenting opinion).

Nor has this Court ever employed anything like gradational review. It is clear that in *Jenkins*, *Kois*, *Manual Enterprises*, and *Ginzburg*, this Court employed *de novo* review, not review deferential to the fact-finder's conclusions as to the elements of prurience and patent offensiveness. *Hamling* further demonstrates the difference be-

tween independent review and general appellate review: the Court first held that the jury determination of obscenity was supported by the evidence and consistent with the applicable constitutional standard, and then reviewed the sufficiency of the evidence arguments regarding other issues with proper deference afforded under the test of *Glasser v. United States*, 315 U.S. 60 (1942). *See Bose*, 466 U.S. at 506, n.26.

Clearly, the employment of community standards by the trier of fact to the first and second elements in no way divests this Court of its constitutional obligation to conduct *de novo*, independent review of these First Amendment questions. The petitioners, as well as the Ninth Circuit, misapprehended the interplay between the jury's role to bring a sense of the "average person" to the fact of obscenity and the reviewing court's role to re-evaluate the evidence under the law, mindful of First Amendment values.

Indeed, this misapprehension is at the core of petitioners' contention that the third value element must remain free of community standards. Because petitioners mistakenly discern that appellate review as limited, rather than independent, they fail to understand that reviewing courts ultimately rescue expression from entirely parochial determinations. Alleged efforts by the States or the Justice Department to harness expression to the tenor of the times can only fail. In the end, as this Court has ably demonstrated in its rulings, the courts of review are the protectors of expression from suppression by majority rule.

II.

PETITIONERS ARE NOT ENTITLED TO REVERSAL WHERE THEY WERE NOT MATERIALLY PREJUDICED BY THE JURY INSTRUCTION TO APPLY COMMUNITY STANDARDS TO THE "VALUE" DETERMINATION; NOR IS THE STATE OBSCENITY STATUTE FACIALLY INVALID SINCE IT CONTAINS NO LANGUAGE THAT WOULD MAKE IT OVERBROAD AND THERE IS NO SHOWING THAT OVERBREADTH WOULD BE SUBSTANTIAL.

Petitioners claim that, if contemporary community standards do not govern the value determination, they are entitled to reversal so that a jury can address that question unrestrained by community standards. They rely on *Marks v. United States*, 430 U.S. 188 (1977) where the jury had been furnished an incorrect element of the offense and this Court remanded the cause so the jury could resolve it in the first instance.

However, this cause is not like *Marks* because petitioners did not receive an instruction incorrectly stating the elements of the offense. Rather, the issue turns on an instruction as to the jury's standard in review in determining the elements of the offense. Therefore, *Hamling v. United States*, 418 U.S. 87 (1974), not *Marks*, is controlling.

Hamling explained that, in an obscenity action, reversal is not necessary, even where the jury instruction as to the standard of review is incorrect, where defendants are not materially prejudiced by the incorrect instruction. In determining material prejudice, the principal concern is that the material not be judged on the basis of each juror's personal opinion nor by its effect on a particularly sensitive or insensitive person. *Hamling*, 418 U.S. at 107. The standard of the "community," whether it be local

or national, accomplishes this purpose. *Hamling*, 418 U.S. at 107.

It is true that *Hamling* presented an "unusual posture" in that the challenged national standard instruction was proper at the time it was given by the trial court. *Hamling*, 418 U.S. at 108. But this case presents a similar posture since this Court has never held that the States may not instruct juries to apply the standard of the community in assessing the value of certain expression. Thus, petitioners must show material prejudice before being entitled to reversal, however, they cannot on this record. The juries in each case were told, both at instruction and at closing arguments, to sit as "average" people and not to indulge their personal tastes or the tastes of particularly sensitive or insensitive persons. (Pope, R. 308, 318, 319-320, 323-325, 328, 333, 336, 342, 360; R. C65, C69; J.A. 25-26); (Morrison, R. 218-219, 307, 311-316, 326; R. C46, C49; J.A. 11, 12).

Furthermore, there is no evidence in this record to suggest that a local community standard was somehow different from a national standard or some other kind of "objective" standard. Nor is there a basis for supposing that the jury would have assumed the local standard might be either stricter or more tolerant than another standard. *See United States v. Cutting*, 538 U.S. 835 (9th Cir. 1986).

Finally, it was never part of the defense in either cause that the materials in question had saving intellectual content to rescue them from prohibition. There is no evidence of awards, citations or favorable reviews, no evidence of a public circulation, no evidence of advertising by national concerns, and no evidence that they might be found in a public place such as a supermarket or library. *See Penthouse Intern., Ltd. v. McAuliffe*, 610 F.2d 1353, 1372 (5th Cir. 1980).

Where petitioners have not argued that these materials have any kind of value, and where they have failed to show how an "average person" in the State of Illinois would be more tolerant or less tolerant toward these particular materials than other "average persons," petitioners cannot show they are materially prejudiced by the community standard instruction as to the value element. Without material prejudice, petitioners are not entitled to reversal.

Moreover, the Illinois obscenity statute is not facially invalid where it can be constitutionally applied even if community standards are an inappropriate standard for determining value. Petitioners' own authority recognizes that, before a statute will be invalidated on its face, the alleged overbreadth involved must be substantial. *New York v. Ferber*, 458 U.S. 747, 769 (1982); *Maryland v. Munson*, 467 U.S. 947, 964-965 (1984). Because there are wide-reaching effects on striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment, this Court recognizes that the overbreadth doctrine is strong medicine, employed with hesitation and only as a last resort. *Ferber*, 458 U.S. at 769. Laws that are too broadly worded may deter protected speech to some unknown extent, but there comes a point where that effect, at best a prediction, cannot with confidence justify invalidating a statute on its face, thereby prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. *Ferber*, 458 U.S. at 770.

The premise that a law will not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications, is as applicable to the publication of books and films as it is to other areas of conduct-plus-speech. *Ferber*, 458 U.S. at 771-772. Thus, the Court's

practice when confronted with ordinary criminal laws that are sought to be applied against protected conduct is not to invalidate the law *in toto*, but rather to reverse the particular conviction. *Ferber*, 458 U.S. at 772.

The Illinois statute in effect at the time of petitioners' acts itself stated that "obscenity shall be judged with reference to ordinary adults." Ill. Rev. Stat. 1983, ch. 38, §11-20. It did not tie this standard to the value determination nor did it geographically delimit a community as the "State of Illinois." This delimitation has been established by case law. *People v. Ridens*, 59 Ill.2d 362, 321 N.E.2d 264 (1974). Thus, even if this Court were to hold that value must be determined outside of contemporary community standards, nothing on the face of the statute prevents it from being applied in accordance with that holding.

Moreover, there has been no showing that the standard of the State community is significantly different from the "objective" or national standard. Where the difference is negligible and at best a prediction, it can hardly be said that the statute reaches any number of impermissible applications, let alone a substantial number. It is only surmise that protected speech was possibly deterred because disseminators thought that value was determined by community standards rather than an "objective" standard, whatever that might be. This is clear because, again, petitioners have not adduced evidence that a local community standard was, in this case, different from any other standard or that the jury assumed the local standard to be stricter or more tolerant than another standard.

Where the statute itself contains no language that would make it overbroad and where there is no showing that any possible overbreadth would be substantial, the statute may not be invalidated on its face.

CONCLUSION

WHEREFORE, the People of the State of Illinois ask this Court to affirm the decision of the Illinois Appellate Court, Second District, and uphold both the Illinois obscenity statute and the petitioners' convictions.

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January 9, 1987

Supreme Court, U.S.
FILED
FEB 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1973

In The

Supreme Court of the United States

October Term, 1986

RICHARD POPE and
CHARLES G. MORRISON,

Petitioners,

vs.

STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

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TABLE OF CONTENTS

Subject Index

Page

Argument

I. Neither the "average person" criterion, ease of state appellate review, nor the nature of this Court's independent review, justify imposition of community standards upon the constitutional value test. 1

II. *Hamling v. United States,* 418 U.S. 87 (1974), allows no deviation from holdings that require the reversal of the petitioners' convictions because of the unconstitutional application of the Illinois obscenity statute. 5

III. It is not the function of this Court to give a saving construction to the Illinois obscenity statute. 7

Conclusion 8

INDEX TO ABBREVIATIONS

RP.C —Common Law Record (pleadings and papers filed) in *People v. Pope*

RM.C—Common Law Record (pleadings and papers filed) in *People v. Morrison*

Pet.Br.—Petitioners' Brief

Res.Br.—Respondent's Brief

TABLE OF AUTHORITIES

Page

CASES

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 8

Chapman v. California, 386 U.S. 18 (1967) 6

Cox v. Louisiana, 379 U.S. 536 (1965) 7

Gooding v. Wilson, 405 U.S. 518 (1972) 7

Hamling v. United States, 418 U.S. 87 (1974) 4, 5, 6

Jenkins v. Georgia, 418 U.S. 153 (1974) 2, 4

Members of the City Council v. Taxpayers for Vincent, — U.S. —, 104 S.Ct. 2118 (1984) 8

Miller v. California, 413 U.S. 15 (1973) 1, 2, 4, 5, 7

New York v. Ferber, 458 U.S. 747 (1982) 2

Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) 4

Penthouse International, Ltd. v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980) 3

Pinkus v. United States, 436 U.S. 293 (1978) 6

Smith v. United States, 431 U.S. 291 (1977) 2

Stromberg v. California, 283 U.S. 359 (1931) 7

United States v. Thirty-seven (37) Photographs, 402 U.S. 363 (1971) 7

United States v. 12 200-Ft. Reels of Super 8MM. Film, 413 U.S. 123 (1973) 7

CONSTITUTIONAL PROVISIONS

United States Constitution, First Amendment 2

TABLE OF AUTHORITIES—Continued

Page

STATUTES

Mass. Gen. Laws Ann., ch. 272, § 31 (Supp. 1986) 3

Minn. Stat. § 617.241(c) (Supp. 1987) 3

Nev. Rev. Stat. § 201.235(1) (1986) 3

N.H. Rev. Stat. Ann. § 650:1(IV)(a) (1986) 3

Utah Code Ann. § 76-10-1201(12) (1978) 3

RULES

Federal Rules of Criminal Procedure, Rule 52(a) 6

Federal Rules of Criminal Procedure, Rule 52(b) 6

ARGUMENT

I. Neither The "Average Person" Criterion, Ease Of State Appellate Review, Nor the Nature Of This Court's Independent Review, Justify Imposition Of Community Standards Upon The Constitutional Value Test.

Respondent argues that an obscenity determination which utilizes the "average person, applying contemporary community standards" on all three components of the test, including the value element, results in an "objective" determination of obscenity. This conclusion is derived from the purposes of the "average person" criterion, which are to avoid focus on the particularly susceptible person or group and to prevent a finding based on the personal opinion of the trier of fact. Ultimately, respondent equates an obscenity test based completely on community standards with the "reasonable person" test of tort law and brands a value deliberation free of community standards to be "standardless". (Res. Br. at 10-22)

Respondent misconceives the nature and function of the tripartite test of *Miller v. California*, 413 U.S. 15 (1973). Although, at least as to "prurient interest" and "patently offensive", the jury is required to look through the eyes of the "average person, applying contemporary community standards", the ultimate inquiry is into what the hypothetical average person in the relevant community *thinks* or *believes*. In other words, the jury must determine the *opinion* of the average adult in the community as to the acceptibility of certain materials. Such an inquiry, if injected into the value determination, does not focus on the work itself, but determines value based on the feelings of the community.

While "community standards" are in effect a measure of the community's tolerance of sexually explicit materials,[1] toleration or lack of toleration is no gauge of the value of a work. Yet, when material is found to be obscene, community intolerance has already prevailed as to "prurient interest" and "patent offensiveness" and, in all likelihood, these findings become determinative of a value deliberation based solely on community standards. If the existence of a separate value test is to mean anything, it must operate free of such community attitudes and prejudices. Otherwise, the entire focus is upon the societal or governmental interest in suppression at the expense of the individual's interest in publication.

Respondent's argument fails to recognize that engrafting a community framework upon the value test places limitations on the resources from which jurors may draw. Jurors are generally told to use their observations and experiences in life. See RP.C52,RM.C31. These observations and experiences may extend well beyond the relevant community itself, and, based on them, jurors are in a position to determine value, perhaps with some assistance from appropriate evidence. For example, in *Jenkins v. Georgia*,

---

[1]*See Smith v. United States*, 431 U.S. 291, 305 (1977) ["contemporary community standards must be applied by juries in accordance with their own understanding of the *tolerance* of the average person in their community . . ."] (emphasis added); *Miller v. California*, 413 U.S. 15, 32 (1973) ["It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found *tolerable* in Las Vegas, or in New York City."] (emphasis added); *New York v. Ferber*, 458 U.S. 747, 761 n.12 (1982) ["It would be equally unrealistic to equate a community's *toleration* for sexually oriented material with the permissible scope of legislation aimed at protecting children from sexual exploitation."] (emphasis added).

418 U.S. 153 (1974), testimony was offered about the critical acclaim of the motion picture and about an academy award nomination related to the picture. Although not central to its decision, this Court also took note of critical commentary and other information about the film. *See also Penthouse International, Ltd. v. McAuliffe*, 610 F.2d 1353, 1372 (5th Cir. 1980).

On the other hand, limitation of jury consideration of value to the community works to confine evidence of value to that within the community and to vitiate the jurors' observations and experiences beyond the boundaries of that community. In many cases, the "community" may be no larger than a county or the area from which the jurors are drawn. *See e.g.* Mass Gen. Laws Ann., ch. 272, § 31 (Supp. 1986); Minn. Stat. § 617.241(c) (Supp. 1987); N.H. Rev. Stat. Ann. § 650:1(IV)(a) (1986); Nev. Rev. Stat. § 201.235(1) (1986); Utah Code Ann. § 76-10-1201(12) (1978). The end result is a value judgment which eschews a broader-based determination and which, instead, is formed completely by parochial factors.

Respondent raises appellate review considerations in support of its position. At one point, it argues that a community-based value determination will facilitate state appellate review:

> Respondent seeks only its sovereign right to permit the citizens of Illinois to act as objective arbiters of contemporary community standards, and to permit the appellate courts of Illinois to review obscenity determinations with the benefit of their own perspective of those same standards. (Res. Br. at 22)

* * *

> Further, Respondent stresses again that appellate review is facilitated when a state court of review is required to assess whether a work offends state community standards. (Res. Br. at 28-29)

On the other hand, it points to the independent review of the record commanded by *Miller* and *Jenkins*, categorizing it as "independent *de novo* review" (Res. Br. at 28) and suggesting that petitioners are incorrect in stating that such independent review is in any way limited.

Respondent's positions are inconsistent. While a community-based value determination may aid state appellate court review, the ultimate determination of obscenity under the First Amendment lies with this Court. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 92 (1973) (Brennan, J., dissenting); *Jenkins v. Georgia*, 418 U.S. 153, 164-165 (1974) (Brennan, J., concurring). To suggest that ease of application by state appellate tribunals be the touchstone for the constitutional formulation is to ask this Court to abdicate its constitutional responsibilities. *Miller* rejected that pathway. 413 U.S. at 29-30.

As the petitioners first noted in their original brief, *Miller* and *Jenkins* mandate an independent judicial review by this court, but imposition of community standards necessarily limits that review. This Court cannot be familiar with standards throughout the different "communities" of the United States. Nor could it necessarily glean that information from the record since the prosecution is not required to present evidence of contemporary community standards. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 55-56 (1973); *Hamling v. United States*, 418 U.S. 87, 100 (1974). Only a value component free of community standards would allow for complete independent judicial review on at least that one element of the tripartite test.

II. Hamling v. United States, 418 U.S. 87 (1974), Allows No Deviation From Holdings That Require The Reversal Of The Petitioners' Convictions Because Of The Unconstitutional Application Of The Illinois Obscenity Statute.

Relying on *Hamling v. United States*, 418 U.S. 87 (1974), respondent asserts that the petitioners are not entitled to reversal of their convictions, even if they prevail on the underlying issue. While acknowledging that the juries in these cases would have been misinstructed on the application of community standards to the value consideration, respondent argues that petitioners must show "material prejudice". (Res. Br. at 32-34) However, *Hamling* is of little benefit to respondent on this issue.

In *Hamling*, this Court rejected uniform national standards in a federal obscenity prosecution, holding that the relevant community standard was that from which the jury was drawn. Although it acknowledged that the defendant, who was tried prior to *Miller*, was entitled to the benefit of any constitutional principles enunciated in *Miller*, the Court found no prejudice in giving instructions which referred to community standards of the "nation as a whole". *Hamling, supra* at 107. As noted by respondent, this Court made reference to the concern that the material be judged neither on the basis of the personal opinion of jurors nor by its effect on a particular sensitive or insensitive person or group. *Hamling, supra* at 107. It also relied on the principle that jury instructions are to be judged as a whole and recognized the unusual posture of the case in which the instructions were correct at the time they were given by the District Court. The Court concluded as follows:

> . . . we hold that reversal is required only where there is a probability that the excision of the references to the 'nation as a whole' in the instruction dealing with community standards would have materially affected the deliberations of the jury. . . .
>
> 418 U.S. at 108.

Unlike *Hamling*, the issue in this case does not involve the scope of the relevant community, but rather concerns itself with the constitutional question of whether the community should be taken into consideration at all in gauging value. Furthermore, in *Hamling*, the jurors were instructed on the broader community rather than the narrower community. Here, the jurors received instructions which mandated that they apply community standards to their value determination, thus markedly limiting the perspective from which that element could be viewed. Under such circumstances, it could hardly be asserted that there was no probability that the deliberations of the jury were materially affected.

It is also important to note that *Hamling* was a federal prosecution. Cases relied on by the Court in reaching its conclusion on the instruction issue involved a refusal to apply the plain error rule of Rule 52(b) of the Federal Rules of Criminal Procedure, and therefore imply that the Court may have been applying the harmless error rule of Rule 52(a). *See Pinkus v. United States*, 436 U.S. 293, 297 (1978). Respondent offers no authority articulating a constitutional harmless error rule where state statutes are applied in violation of First Amendment rights. Even if the harmless error rule relating to federal constitutional errors in criminal trials could somehow be applied, the respondent would have to show that it was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967). The burden is not that of the petitioners.

The cases noted in the petitioners' original brief are clear. The unconstitutional application of the Illinois obscenity statute to them requires reversal of their convictions.

III. It Is Not The Function Of This Court To Give A Saving Construction To The Illinois Obscenity Statute.

Respondent argues that, even if community standards may not be applied to the value element, the Illinois obscenity statute is not facially invalid because it can be constitutionally applied. (Res. Br. at 34-35) It ascribes importance to the fact that, as written, the statute does not command application of community standards to value. This argument overlooks some well-established principles.

The Illinois Appellate Court has effectively construed the Illinois obscenity statute to include community standards in its value determination. In making its constitutional determination, this Court must accept the construction of the statute by the state court, for it is not the task of this Court to construe and narrow state statutes. *Gooding v. Wilson*, 405 U.S. 518, 520 (1972); *United States v. Thirty-seven (37) Photographs*, 402 U.S. 363, 369 (1971); *United States v. 12 200-Ft. Reels of Super 8MM. Film*, 413 U.S. 123, 130 n.7 (1973); *cf. Miller v. California*, 413 U.S. 15 (1973). As written and authoritatively construed, state legislation may be facially invalidated by this Court. *Cf. Stromberg v. California*, 283 U.S. 359 (1931); *Cox v. Louisiana*, 379 U.S. 536 (1965).

In the event that the Court resolves the underlying issue in favor of the petitioners, the respondent is essentially asking the Court to construe the Illinois obscenity

statute so as to be constitutional. Not only would such action be contrary to developed principles, but it would also be fruitless from a practical standpoint. The State of Illinois has a limited interest in maintaining the Illinois obscenity statute at issue in these cases. As noted in the petitioners' original brief, Illinois now has an obscenity statute which cures the infirmity complained of by the petitioners. (Pet. Br. at 11, 21, App. 4) Just as facial invalidation would have minimum impact upon the administration of the Illinois obscenity statute, a saving construction would lack similar import.

Contrary to respondent's suggestion, the substantial overbreadth doctrine of *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) is inapplicable to this case and lends no support to any attempt to save the statute at issue. This statute, as construed by the Illinois Appellate Court, is invalid *in every application* and, for that reason, cannot stand. *Members of the City Council v. Tarpayers for Vincent*, — U.S. —, 104 S.Ct. 2118, 2124-2125 (1984); (see Pet. Br. at 30-32). This Court should invalidate the statute in its entirety.

CONCLUSION

The respondent has articulated no meaningful rationale for applying community standards to the value determination. Indeed, it is impossible to do so from either a constitutional or policy standpoint. This Court should complete the framework previously laid and clearly affirm the existence of a value test unfettered by community

standards. It should hold the Illinois obscenity statute unconstitutional and reverse the convictions of the petitioners.

Respectfully submitted,

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February 1987

Supreme Court, U.S.
FILED
NOV 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RICHARD POPE and CHARLES G. MORRISON,
Petitioners,

v.

STATE OF ILLINOIS,
Respondent.

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, ACLU OF ILLINOIS AND PHE, INC. IN SUPPORT OF PETITIONERS

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November 20, 1986

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TABLE OF CONTENTS

	Page
INTEREST OF *AMICI CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	7
I. THE LOWER COURTS' USE OF A COMMUNITY STANDARD IN APPLYING THE VALUE TEST VIOLATED THE FIRST AMENDMENT	7
A. The First Amendment's Protection of Speech Cannot Be Conditioned on the Majority's Judgment That the Speech Has Value	7
B. Although Community Interests in Suppressing "Offensive" and "Prurient" Speech May Vary From Community to Community, the Individual's First Amendment Interest in Disseminating or Receiving Valuable Speech is the Same in Every Community	11
C. The Lower Courts' Ruling Would Prevent Meaningful Judicial Review of the Jury's Content-Based Determination That the Speech Lacks Value and is Therefore Unprotected by the First Amendment	14
D. Applying the Value Test by Reference to Varying Community Standards Would Substantially Chill Speech That Has Serious Literary, Artistic, Political or Scientific Value	18

TABLE OF CONTENTS—Continued

Page

II. THE COURT SHOULD LIMIT ITS HOLDING TO THE PRECISE ISSUE RAISED BY THIS CASE, BUT IF IT ADDRESSES OTHER ASPECTS OF THE VALUE TEST IT SHOULD RULE THAT BECAUSE THE VALUE REQUIREMENT IS AN EXCEPTION TO THE GENERAL RULE THAT SPEECH IS PROTECTED REGARDLESS OF ITS VALUE, THAT REQUIREMENT MUST BE NARROWLY CONSTRUED 23

CONCLUSION 27

TABLE OF AUTHORITIES

CASES — Page

A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964) 18
Associated Press v. United States, 326 U.S. 1 (1944) 21
Bantam Books v. Sullivan, 372 U.S. 58 (1963) 14, 18, 19
Blount v. Rizzi, 400 U.S. 410 (1971) 18
Bose Corp. v. Consumers Union of United States, 466 U.S. 486 (1984) 14, 17
Brockett v. Spokane Arcades, Inc., 105 S. Ct. 2794 (1985) 11
Carey v. Brown, 447 U.S. 455 (1980) 17
Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980) 17
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) ..... *passim*
City of Renton v. Playtime Theatres, Inc., 54 U.S.L.W. 4160 (1986) 17
Cohen v. California, 403 U.S. 15 (1971) 9, 11
Court v. State, 63 Wis.2d 570, 217 N.W.2d 676 (1974) 20
Edwards v. South Carolina, 372 U.S. 229 (1963) 9
Erznoznik v. Jacksonville, 422 U.S. 205 (1975) 3
Garcia v. Texas, 633 S.W.2d 611 (Tex. Ct. App. 1982) 4
Ginzburg v. United States, 383 U.S. 463 (1966) 25
Hamling v. United States, 418 U.S. 87 (1974) 15, 20
Hannegan v. Esquire, 327 U.S. 146 (1946) 9
Holden v. Hardy, 169 U.S. 366 (1898) 14
Hudgens v. NLRB, 424 U.S. 507 (1976) 17
Jacobellis v. Ohio, 378 U.S. 184 (1964) 14
Jenkins v. Georgia, 418 U.S. 153 (1974) 15, 20
Kaplan v. California, 413 U.S. 115 (1973) 15
Kingsley International Pictures Corp. v. Regents, 360 U.S. 684 (1959) 8
Kois v. Wisconsin, 408 U.S. 229 (1972) ..... *passim*
Marcus v. Search Warrants of Property, 367 U.S. 717 (1961) 19
Memoirs v. Massachusetts, 383 U.S. 413 (1966) 26

TABLE OF AUTHORITIES—Continued

	Page
Miller v. California, 413 U.S. 15 (1973)	*passim*
Mishkin v. New York, 383 U.S. 502 (1966)	12
Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971)	17
Mozert v. Hawkins County Public Schools, —— F. Supp. —— (E.D. Tenn., No. Civ-2-83-401, Oct. 24, 1986), 55 U.S.L.W. 2243 (Nov. 4, 1986)	22
NAACP v. Button, 371 U.S. 415 (1963)	8, 11
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	*passim*
Paris Adult Theatre v. Slayton, 413 U.S. 49 (1973)	15, 16
Pennekamp v. Florida, 328 U.S. 331 (1945)	14
Penthouse Int'l, Ltd. v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980), *cert. dismissed*, 447 U.S. 931 (1980)	4
Police Department of Chicago v. Mosley, 408 U.S. 92 (1972)	17
Rosenblatt v. Baer, 383 U.S. 75 (1966)	14
Roth v. United States, 354 U.S. 476 (1957)	*passim*
Schaefer v. United States, 251 U.S. 466 (1920)	9
Smith v. California, 361 U.S. 147 (1959)	19
Smith v. United States, 431 U.S. 291 (1977)	*passim*
Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975)	18
Speiser v. Randall, 357 U.S. 513 (1958)	19
State v. Princess Cinema, 292 N.W.2d 807 (Wis. 1980)	4, 5
State v. Regan, 640 P.2d 725 (Wash. 1982)	4
Tennessee v. Summers, 692 S.W.2d 439 (Tenn. Cr. App. 1985)	4
Terminiello v. Chicago, 337 U.S. 1 (1948)	10
Time v. Pape, 401 U.S. 279 (1971)	14
United States v. 2,200 Paper Back Books, 565 F.2d 566 (9th Cir. 1977)	16
United States v. Bagnell, 679 F.2d 826 (11th Cir. 1982)	4
United States v. Heyman, 562 F.2d 316 (4th Cir. 1977)	4

TABLE OF AUTHORITIES—Continued

Page

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 8, 10
Winters v. New York, 333 U.S. 507 (1947) 11
Wooley v. Maynard, 430 U.S. 705 (1977) 8

MISCELLANEOUS

Bell, *Determining Community Standards*, 63 A.B.A.J. 1202 (1977) 20
Hunsaker, *The 1973 Obscenity-Pornography Decisions: Analysis, Impact, and Legislative Alternatives*, 11 SAN DIEGO L. REV. 906 (1974) ..4, 11, 25
Lockhart & McClure, *Censorship Of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 1 (1960) 16
Lockhart, *Escape from the Chill of Uncertainty: Explicit Sex and the First Amendment*, 9 GA. L. REV. 533 (1975) 4, 22, 25
Note, *Community Standards, Class Actions, and Obscenity Under Miller v. California*, 88 HARV. L. REV. 1838 (1975) .....*passim*
Note, *Community Standards in Obscenity Adjudication*, 66 CAL. L. REV. 1277 (1978) 4, 16
F. Schauer, THE LAW OF OBSCENITY (1976).....*passim*
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Wash. Post, Nov. 10, 1986, at A1 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1973

RICHARD POPE and CHARLES G. MORRISON,
Petitioners,

v.

STATE OF ILLINOIS,
Respondent.

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, ACLU OF ILLINOIS AND PHE, INC. IN SUPPORT OF PETITIONERS

INTEREST OF AMICI

The American Civil Liberties Union is a non-partisan organization of over 250,000 members, dedicated to defending the fundamental liberties guaranteed in the Bill of Rights. The ACLU of Illinois is one of its state affiliates, with more than 12,000 members. The ACLU and its affiliates are devoted to defending freedom of expression under the First Amendment. They actively oppose laws and other official actions which limit the flow of information and the freedom of self-expression which the First Amendment guarantees.

The ACLU opposes all restrictions on the availability of books, films and other media based on their content.

So long as courts permit any such restrictions, the ACLU will oppose all efforts to expand the scope of such restrictions. The argument in this brief, however, is not based on the ACLU's opposition to all content-based restrictions on speech, but on currently recognizable legal principles.

PHE, Inc., is a corporation organized under the laws of North Carolina. It is engaged in the business of mailing various materials it believes are protected by the First Amendment, including sexually explicit magazines and videotapes, throughout the United States. PHE, Inc. only mails such materials to adults, and only upon request. PHE, Inc. does not have any way of ascertaining the community standards concerning "offensiveness," "prurience," or "value" of the countless communities to which it mails materials. Accordingly, unless the judgment below is reversed, it will be forced to cease distribution of a wide range of materials it genuinely believes would not be found offensive, prurient, or lacking value in the vast majority of all American communities, simply because these materials might be found lacking in value in a particular, but unknown, community.

Petitioners and respondent have both consented to the filing of this brief. Their letters of consent are being filed with the Clerk of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Although the First Amendment protects almost all speech, regardless of its "value," this Court has held that "obscenity" is one of the very rare, "well-defined and narrowly limited" exceptions to this rule.[1] In creating

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[1] *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). In *Chaplinsky*, the Court indicated that "fighting words" and libelous speech are also not protected by the First Amendment. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court narrowed the latter exception, holding that only maliciously false

this exception, the Court has reasoned that society has a legitimate but qualified interest in prohibiting "offensive" and "prurient" sexual speech. Except in the context of "obscene" speech, offensiveness and prurience are not sufficient grounds to overcome First Amendment protection for speech.[2] But the Court has *also* found that the individual's interest in disseminating or receiving "obscene" speech is *de minimis* because its "value" is minimal.[3] Consequently, the Court has reasoned, the First Amendment does not shield a speaker of "valueless" obscenity from punishment for offending social norms of "offensiveness" and "prurience." Consistent with this reasoning, however, the Court has long held that if speech *does* have serious literary, artistic, political, or scientific value it is protected by the First Amendment even if the "average person" considers this valuable speech to be "offensive" and "prurient".[4]

This fundamental "value" principle is incorporated in the third prong of the obscenity test established in *Miller v. California*, 413 U.S. 15, 24 (1973). Under *Miller*, factfinders must look to the "average person, applying community standards" in applying the first two prongs to determine whether speech is offensive and appeals to prurient interests. But *Miller* does not require factfinders to use community standards when applying the value test. To the contrary, both *Miller* and subsequent decisions of this Court strongly suggest that *Miller*'s value test is *not* applied by reference to varying community

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defamatory speech is outside the protection of the First Amendment.

[2] *See Erznoznik v. Jacksonville*, 422 U.S. 205 (1975).

[3] *Roth v. United States*, 354 U.S. 476, 484-85 (1957); *Chaplinsky*, 315 U.S. at 571-72.

[4] *Miller v. California*, 413 U.S. 15, 24 (1973).

standards.[5] The view that the value test should not be applied by reference to community standards has overwhelmingly been adopted by lower courts and commentators.[6]

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[5] The Court's discussion of community standards in *Miller*, strongly suggested that those standards were relevant only in determining "what appeals to the 'prurient interest' or is 'patently offensive.'" 413 U.S. at 30. Subsequently, in *Smith v. United States*, 431 U.S. 291 (1977), the Court again indicated that prurience and offensiveness were to be determined by reference to community standards, but indicated that "[l]iterary, artistic, political, or scientific value, on the other hand, is not discussed in *Miller* in terms of contemporary community standards." 431 U.S. at 301. In support of this distinction, the Court cited Professor Schauer's treatise, THE LAW OF OBSCENITY 123-124 (1976), where he explains that "[t]here has never been any indication by the Court that the merit of the material itself, as embodied in [the third prong of the *Miller* test], should or can vary from community to community. . . . Whether a work has literary, artistic, political, or scientific value, . . . unlike the prurient-interest and patent-offensiveness requirements, is not subject to the community-standards factor and is not affected by the change to local standards." *See* 431 U.S. at 301.

[6] *United States v. Bagnell*, 679 F.2d 826, 835 (11th Cir. 1982), *cert. denied*, 460 U.S. 1047 (1983); *Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1353, 1363 (5th Cir. 1980), *cert. dismissed*, 447 U.S. 931 (1980); *United States v. Heyman*, 562 F.2d 316, 318 (4th Cir. 1977); *Tennessee v. Summers*, 692 S.W.2d 439 (Tenn. Cr. App. 1985); *Garcia v. Texas*, 633 S.W.2d 611, 613 (Tex. Ct. App. 1982), *overruled on other grounds, Davis v. State*, 658 S.W.2d 572 (Tex. Cr. App. 1983); *State v. Regan*, 640 P.2d 725, 731 (Wash. 1982) (Utter, J., concurring); *State v. Princess Cinema*, 292 N.W.2d 807, 811 (Wis. 1980); F. Schauer, THE LAW OF OBSCENITY 123-24 (1976); Hunsaker, *The 1973 Obscenity-Pornography Decisions: Analysis, Impact, and Legislative Alternatives*, 11 SAN DIEGO L. REV. 906, 916-17 (1974) (hereafter "Hunsaker"); Lockhart, *Escape from the Chill of Uncertainty: Explicit Sex and the First Amendment*, 9 GA. L. REV. 533, 553-55 (1975) (hereafter "Lockhart"); Schauer, *Reflections on "Contemporary Community Standards": The Perpetuation of an Irrelevant Concept in the Law of Obscenity*, 56 N.C. L. REV. 1, 21 (1978) (hereafter "Schauer"); Note, *Community Standards, Class Actions, and Obscenity Under Miller v. California*, 88 HARV. L. REV. 1838, 1854 (1975) (hereafter "*Com-*

Standing alone among all of the state and federal courts that have expressly resolved this issue,[7] the courts below held that Illinois' variant of *Miller*'s value test can constitutionally be applied by reference to community standards.[8] As *amici* will show in Point I, this departure from an otherwise unanimous body of case law does not adequately safeguard valuable speech and therefore violates the First Amendment.

Miller's value test performs a special and crucial function in protecting First Amendment interests, a function to which community standards are both irrelevant and inimical. The Court has authorized the use of community standards when applying *Miller*'s first two prongs because those prongs are aimed at determining whether there is a societal interest in prohibiting the speech at issue. Unlike the first two prongs, *Miller*'s value test is not designed to identify *societal* interests in prohibit-

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munity Standards"); Note, *Community Standards in Obscenity Adjudication*, 66 CAL. L. REV. 1277, 1286 & n.62 (1978) (hereafter "*Obscenity Adjudication*").

[7] At one time, the Wisconsin Supreme Court also took the view that *Miller's* third prong was to be applied by reference to community standards. That Court has now expressly repudiated that position. *State v. Princess Cinema*, 292 N.W.2d 807, 811 (Wis. 1980).

[8] The value test adopted in Illinois' obscenity statute has been interpreted to require that material be "utterly without redeeming social value," in order to be found obscene. Although this language is different from that employed in *Miller's* third prong, this difference does not make the use of community standards in the application of Illinois' test any less constitutionally infirm. The constitutional problems posed by the use of community standards in a test focusing on the value of speech stem from the majoritarian nature and inherent uncertainty and variability of community standards. Consequently, if this Court agrees with the overwhelmingly accepted view that *Miller's* value test cannot constitutionally be applied by reference to community standards, Illinois' reference to community standards in applying the Illinois variant of that value test is equally unconstitutional.

ing speech, but instead is intended to measure and protect the *individual*'s First Amendment interest in disseminating or receiving valuable speech. Community standards are not relevant to this interest, which is the individual's and arises from the federal Constitution. Indeed, because community standards are majoritarian in nature and necessarily vary among the thousands of communities in the United States, their use would completely undermine the function of *Miller*'s third prong, which is meant to safeguard interests that exist without reference to local majoritarian judgments. Moreover, the importance of applying the third prong on an objective basis is heightened by the application of community standards in *Miller*'s first two prongs; it is essential that the First Amendment protection afforded by *Miller* not be entirely dependent on the judgments and values of local majorities.

As *amici* will show, the decisions below are fundamentally at odds with four of the most basic principles of First Amendment law. *First*, by limiting the third prong's protection to speech that the average members of a particular community would find valuable, the Illinois courts have disregarded the central purpose of the First Amendment, which is to protect speech regardless of whether it is valued by the majority. *Second*, by making the basic values protected by the First Amendment a matter of local definition, the Illinois rule vitiates the concept of a "national Constitution" in which "fundamental First Amendment limitations . . . do not vary from community to community." *Miller v. California*, 413 U.S. at 30. *Third*, the Illinois rule completely undermines the third prong's critical role in safeguarding speech, by preventing meaningful judicial review of the jury's content-based determination of whether the speech has value. *Fourth*, the Illinois rule undermines the protection the third prong has afforded speakers who believe their speech has value by making that protection

dependent on compliance with thousands of varying and unarticulated community standards. Because speakers outside those communities cannot possibly ascertain those standards before speaking, the Illinois rule has a substantial chilling effect on speech that many individuals—including the average person in many or even most communities—would find valuable. For all of these reasons, the Constitution does not permit *Miller*'s third prong to be applied by reference to a patchwork of varying community standards.

In Point II, *amici* will urge the Court to limit its holding to the precise issue raised by this case, and to refrain from attempting further definition of the term "serious literary, artistic, political, or scientific value." That course is particularly appropriate in this case because these aspects of the value test are not even raised by the statutory variant of that test at issue here. If the Court does choose to address this issue, however, it should rule that because requiring sexually explicit speech to have value is itself an exception to the general rule that speech is protected regardless of its value, the value requirement must be narrowly construed.

ARGUMENT

I. THE LOWER COURTS' USE OF A COMMUNITY STANDARD IN APPLYING THE VALUE TEST VIOLATED THE FIRST AMENDMENT.

A. The First Amendment's Protection of Speech Cannot Be Conditioned on the Majority's Judgment That the Speech Has Value.

An instruction telling the jury to decide whether the "average person, applying contemporary community standards"[9] would find that the speech at issue had serious literary, artistic, political or scientific value, effectively requires the jury to evaluate the speech from

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[9] *See Miller*, 413 U.S. at 24.

the perspective of the majority in its community. Thus, as construed and applied by the courts below, *Miller*'s value test does not protect speech that even a substantial minority of the community considers valuable.

That ruling is contrary to basic First Amendment principles that this Court has repeatedly reaffirmed. As the Court emphasized in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943), "[t]he very purpose of a Bill of Rights" was to place certain subjects "beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." Indeed, in *Miller* the Court expressly stated that "[t]he First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, *regardless of whether . . . a majority of the people approve of the ideas these works represent.*" 413 U.S. at 34 (emphasis added). *Miller* itself therefore envisions that although offensiveness or prurience may be dependent on local majoritarian sentiment, valuable speech does not lose its constitutional protection simply because its value is recognized only by a minority.

In a wide range of contexts the Court has held that speech must be protected from majoritarian hostility. For example, in *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684 (1959), the Court rejected the contention that a state obscenity statute was constitutional because it only proscribed speech that was contrary to the "moral standards, the religious precepts and the legal code" of the majority. The Court emphasized that the First Amendment's guarantee "is not confined to the expression of ideas that are conventional or *shared by a majority.*" 360 U.S. at 688-89 (emphasis added).[10]

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[10] *Accord Wooley v. Maynard*, 430 U.S. 705, 715 (1977) ("The First Amendment protects the rights of individuals to hold a point of view different from the majority."); *NAACP v. Button*, 371 U.S. 415, 445 (1963) (Constitution protects expression without

At least two rationales underlie these cases. Initially, as Justice Harlan explained in *Cohen v. California*, 403 U.S. 15 (1971), in a "society as diverse and populous as ours," the decision whether speech is valuable and worthy of consideration is left largely in "the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." 403 U.S. at 24. Thus, in *Hannegan v. Esquire*, 327 U.S. 146 (1946), the Court held that the Postmaster General could not deny lower mailing rates to a publication because of its allegedly poor taste, and explained that individuals should be free to judge for themselves whether speech is "trash" or has "enduring values":

> Under our system of government there is an accommodation for the widest varieties of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. There doubtless would be a contrariety of views concerning Cervantes' Don Quixote, Shakespeare's Venus & Adonis, or Zola's Nana. . . . From the multitude of competing offerings the public will pick and choose. What seems to one to be trash may have for others fleeting or even enduring values.

327 U.S. at 157. Justice Frankfurter, concurring in the judgment, observed that "the right of expression beyond

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regard to "the truth, popularity or social utility of the ideas and beliefs which are offered"); *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963) (reversing conviction for breach of peace where the evidence "showed no more than that the opinions which [the defendants] were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection"); *Schaefer v. United States*, 251 U.S. 466, 482 (1920) (Brandeis, J., dissenting) (discussing the need to "preserve the right of free speech" from suppression by "well-meaning majorities").

the conventions of the day" is "the very basis of a free society." 327 U.S. at 160. *See also Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (the "right to speak freely and to promote diversity of ideas and programs is . . . one of the chief distinctions that sets us apart from totalitarian regimes"). The protection afforded expression that may not be valued by the majority is also essential because "[w]e can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 641-42 (1943).

The lower courts' ruling abandons these basic First Amendment principles. By restricting the protection of *Miller's* value test to speech that the majority of citizens in a particular community would find valuable, the Illinois rule has improperly denied that protection to a vast amount of speech that does have "serious literary, artistic, political, or scientific value." That result is neither required by, nor consistent with, *Miller's* value test. As Professor Schauer has observed, "the purpose of the obscenity laws is not to 'level' the available reading matter to the majority or lowest common denominator of the population. . . . It is obvious that neither *Ulysses* nor *Lady Chatterley's Lover* would have literary appeal to the majority of the population." F. Schauer, THE LAW OF OBSCENITY 144 (1976).[11]

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[11] As the history of obscenity regulation bears out, permitting the evaluation of speech to rely on contemporary community standards, poses particular dangers for speech that may be "ahead of its time." Professor Schauer notes that "[d]etermining which are the serious or important or valuable works of today . . . would be a simpler task if we could be sure that citizens of the future would not look back and criticize the suppression of great literature in 1975 in the same way that we in 1975 look back at 1925. But standards and values do change, and one of the great difficulties with obscenity laws lies in trying to locate and protect from regulation not only those works which are fully accepted by society today, but

The protection of the First Amendment clearly extends to speech the majority does not find to have value, and even to speech that is positively abhorrent to the majority. Accordingly, *Miller's* third prong cannot constitutionally be applied by reference to "community standards."

B. Although Community Interests in Suppressing Offensive" and "Prurient" Speech May Vary From Community to Community, the Individual's First Amendment Interest in Disseminating or Receiving Valuable Speech is the Same in Every Community.

As noted, it has long been established that except for certain "well-defined and narrowly limited classes of speech," *Chaplinsky*, 315 U.S. at 571-72, speech is constitutionally protected regardless of its "value." [12] These narrow classes, which include obscenity, are exceptions to this rule because the Court has found that such speech is almost completely lacking in value (rendering the individual's interest in the speech *de minimis*), *and* there is a strong societal interest in prohibiting such speech.[13]

The first two prongs of the *Miller* test, which ask whether the speech is "patently offensive" and appeals to shameful or morbid interests in sex,[14] are aimed at deter-

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also those which might be fully accepted in 10 years." F. Schauer, THE LAW OF OBSCENITY 136 (1976).

[12] *See, e.g., Cohen v. California*, 403 U.S. 15, 25 (1971); *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964); *NAACP v. Button*, 371 U.S. 415, 445 (1963); *Winters v. New York*, 333 U.S. 507, 510 (1948).

[13] *See Miller*, 413 U.S. at 20-21; *Roth*, 354 U.S. at 484-85; *Chaplinsky*, 315 U.S. at 571, 572.

[14] In *Miller*, the Court used the term "prurient interest." 413 U.S. at 24. The Court has recently explained that this refers to a shameful or morbid interest, not a "normal" or "healthy" interest in sex. *Brockett v. Spokane Arcades, Inc.*, 105 S. Ct. 2794, 2799 (1985).

mining whether there is a legitimate *societal* interest in *prohibiting* the speech at issue. Not surprisingly, the Court has indicated that community considerations may be relevant to these inquiries.[15] Thus, in deciding whether speech is "patently offensive," reference to community standards permits the jury to determine whether the speech implicates the relevant interests of the affected community. By allowing the offensiveness issue to be judged in this manner, the Court has been able to accommodate the varying interests that different communities may have in regulating sexually explicit speech.[16] Similarly, use of community standards in deciding whether the speech appeals to a "shameful" or "morbid" interest in sex, allows the jury to focus on what the affected community considers shameful or morbid, and also to focus on the particular audience the speech was designed to reach.[17]

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[15] However, many commentators have questioned the use of community standards in applying *any* of *Miller's* three prongs. *See, e.g.*, Schauer, *supra* note 4; Hunsaker, *supra* note 4, at 933.

[16] In explaining why state community standards can be used to determine whether speech is patently offensive and appeals to prurient interests, the Court in *Miller* emphasized the importance of accommodating these diverse interests. *Miller*, 413 U.S. at 32 ("It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City."). In *Smith*, the Court again indicated that there are local interests in the regulation of offensive and prurient sexually explicit speech, and explained that these interests are "fully satisfie[d]" by "the jurors' application of contemporary community standards." 431 U.S. at 304 n.10.

[17] *See Mishkin v. New York*, 383 U.S. 502, 509 (1966). The Court has indicated that reference to "community" standards is also designed to prevent jurors from imposing their *personal* views or the views of an unusually sensitive person. *Roth*, 354 U.S. at 489; *see Miller*, 413 U.S. at 33. To that extent, the use of "community" standards, rather than the jurors' own personal standards, might be viewed as safeguarding protected speech. This view is necessarily based on the questionable assumptions that "community"

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The Court has never suggested, however, that community standards have any relevance to the value test in *Miller*'s third prong. That test requires the court to determine whether certain basic and fundamentally important First Amendment interests—the right to speak and receive speech that has serious literary, artistic, political, or scientific value—are implicated by the speech in question. If these paramount individual interests are implicated, that speech is protected by the First Amendment.

The lower courts' ruling would make this central constitutional inquiry dependent on varying community standards.. As a consequence, the individual's basic First Amendment interest would depend largely on the community in which the individual speaks or receives speech, varying widely and unpredictably among the thousands of diverse communities across the United States.

Although such variation may be a regrettable but necessary concomitant of the first two prongs (because they measure the different interests that communities have in prohibiting speech), variation is clearly impermissible in determining whether the basic First Amendment interests protected by the third prong are implicated. In *Miller*, for example, the Court expressly stated that "[u]nder a national Constitution, fundamental First

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standards are more protective of speech than the "personal" standards of jurors, and that an instruction can succeed in preventing jurors from applying their personal standards. Even if these assumptions were correct, it is clear that whatever protective value use of community standards may have is overwhelmingly outweighed by the host of problems that it creates. First Amendment values would be far better served by directly instructing jurors not to rely on their personal opinions (or the opinions of unusually sensitive persons), and also to consider other evidence such as the judgment of experts. In short, use of community standards in the first two prongs cannot be justified as serving First Amendment goals, but only, as explained above, as identifying majoritarian interests in the suppression of speech.

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Amendment limitations on the powers of the States do not vary from community to community." *Miller*, 413 U.S. at 30. *See also Rosenblatt v. Baer*, 383 U.S. 75, 84 (1966); *Jacobellis v. Ohio*, 378 U.S. 184, 194 (1964); *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946).[18] As the Court has long recognized:

> While the people of the state may doubtless adopt such systems of laws as best conform to their own traditions and customs, the people of the entire country have laid down in the Constitution of the United States certain fundamental principles to which each member of the Union is bound to accede . . . .

Holden v. Hardy, 169 U.S. 366, 389 (1898).

Because the First and Fourteenth Amendments do not envision that those "fundamental principles" will vary according to the importance attached to them by thousands of local communities, the lower courts' ruling should be reversed.

C. The Lower Courts' Ruling Would Prevent Meaningful Judicial Review of the Jury's Content-Based Determination That the Speech Lacks Value and is Therefore Unprotected by the First Amendment.

In First Amendment speech cases, it is well-established that appellate courts, including this Court, must independently review jury findings of constitutional fact.[19] This requirement "reflects a deeply held conviction that judges—and particularly members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution." *Bose Corp v. Consumers Union of United States*, 466 U.S. 486, 510-511 (1984). The Court has consistently reaffirmed this rule in obscenity cases, where the line between constitutionally protected speech and obscenity is "dim and uncertain," *Bantam Books v. Sullivan*, 372

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[18] *Accord* F. Schauer, THE LAW OF OBSCENITY 124 (1976).

[19] *See, e.g., Time v. Pape*, 401 U.S. 279, 284 (1971); *New York Times v. Sullivan*, 376 U.S. 254, 285 (1964).

U.S. 58, 66 (1963), and therefore the need for effective review of findings of constitutional fact is particularly acute. *See Miller*, 413 U.S. at 25 (recognizing "the ultimate power of appellate courts" to protect First Amendment values in obscenity cases).[20] In particular, the Court has emphasized the role of appellate courts in assuring the proper application of *Miller's* value test, instructing that "*courts* must always remain sensitive to any infringement of genuinely serious, literary, artistic, political or scientific expression." *Miller*, 413 U.S. at 23 (emphasis added). *See also Smith v. United States*, 431 U.S. 291, 305 (1977).

Because of the special role of juries in identifying "community standards" in a particular locale, the use of community standards in *Miller's* value test would almost totally disable courts from reviewing a jury finding that speech does not have value. The Court has held that in determining the "community standard", the jury is permitted to rely on its own knowledge of the community.[21] It has suggested that because of this knowledge juries may reject *any* and *all* evidence in the record pertaining to community standards.[22] Because the most critical "evi-

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[20] *Accord Jenkins v. Georgia*, 418 U.S. 153, 160 (1974); *Kois v. Wisconsin*, 408 U.S. 229 (1972) (*per curiam*).

[21] In determining the community standard the "juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination . . . ." *Hamling v. United States*, 418 U.S. 87, 104-05 (1974); *Smith v. United States*, 431 U.S. at 302. Even though the allegedly obscene material itself provides no evidence of the community's standard, if that material is placed into evidence no additional proof is required for the jury to find that the material is obscene. *Kaplan v. California*, 413 U.S. 115, 121 (1973); *Paris Adult Theatre v. Slayton*, 413 U.S. 49, 56 (1973).

[22] *See, e.g., Smith v. United States*, 431 U.S. 291, 297 (1977) (upholding jury finding that material was patently offensive and appealed to prurient interests in sex even though jury rejected undisputed evidence pertaining to community standards).

dence" of community standards (the jury's own knowledge) is not a part of the record, because whatever evidence is in the record often provides little basis for discerning the community standard,[23] and because juries need not articulate how they identified the standard they applied, appellate courts cannot meaningfully review jury determinations of community standards. Moreover, because juries are not required to articulate the community standard they have applied, appellate courts cannot even know which community standard was applied by the jury, and consequently have no way to determine whether that standard was *properly* applied to the speech at issue.[24]

Although any rule that prevents judicial review of the jury's findings of constitutional fact in speech cases would violate the First Amendment, such a rule is especially troublesome when the jury is making a content-based judgment about speech. Content-based distinctions

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[23] *See Paris Adult Theatre*, 413 U.S. at 56 n.6.

[24] *See Smith v. United States*, 431 U.S. at 315-16 (Stevens, J., dissenting) ("[B]ecause the record never discloses the obscenity standards which the jurors actually apply, their decisions in these cases are effectively unreviewable by an appellate court."); *United States v. 2,200 Paper Back Books*, 565 F.2d 566, 570 n.7 (9th Cir. 1977); *Community Standards*, *supra* note 6, at 1844; Lockhart & McClure, *Censorship Of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 1, 112-13 (1960); *Obscenity Adjudication*, *supra* note 6, at 1290.

Hence, if community standards were employed in all three of *Miller's* prongs, judicial review of the jury's application of those prongs would be limited to determining whether the speech depicted "hard core" sexual conduct. If it did, the jury's application of the *Miller* prongs could only be reversed if the reviewing court were to *disregard* the jury's determination and application of the community standard and decide that *no* community could constitutionally find that the speech at issue was patently offensive, appealed to prurient interests, and lacked serious value. Review on this very limited and *ad hoc* basis neither adequately safeguards First Amendment rights nor contributes to the evolution of workable legal principles.

have always been presumptively unconstitutional and subject to this Court's closest scrutiny.[25] Moreover, because juries may not be sufficiently sensitive to the values protected by the First Amendment (and in particular may punish speech simply because it is unpopular), the Court has rejected otherwise constitutional legal rules because they posed an undue risk that jury findings would be influenced by the content of speech. *See Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971); *Bose Corp. v. Consumers Union*, 466 U.S. 486, 510 (1984).

The value test incorporated in *Miller's* third prong, however, not only makes it *possible*, but explicitly *requires* the jury to assess the content of speech. The Court's longstanding recognition that content-based judgments create grave risks to First Amendment liberties compels the conclusion that the jury's application of this test must be subject to meaningful judicial review. The lower courts' use of a community standard in the application of the value test, however, would have precisely the opposite result, rendering the jury's content-based determination effectively unreviewable.

Although the problem of unreviewability is also posed by the use of community standards in *Miller's* first two prongs, this makes it even more essential that the third prong be applied in a manner that permits effective appellate review. Indeed in *Smith*, after observing that *Miller* had not discussed the third prong "in terms of contemporary community standards," 431 U.S. at 301, the Court rejected the contention that the jury's obscenity finding was not reviewable, relying in significant part

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[25] *City of Renton v. Playtime Theatres Inc.*, 54 U.S.L.W. 4160, 4161 (1986); *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Carey v. Brown*, 447 U.S. 455, 462-63 & n.7 (1980); *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563 n.6 (1980); *Hudgens v. NLRB*, 424 U.S. 507, 520 (1976).

on the rationale that the third prong "is particularly amenable to appellate review." 401 U.S. at 305.

Moreover, although appellate review of the application of all three prongs is important, the abrogation of appellate review with respect to the third prong's value test has the most serious consequences, because it is that test which assures protection of *valuable* speech, deemed by *Miller* to be of transcendent First Amendment importance. If the jury mistakenly determines that the speech at issue does not have value, then speech which should be protected by the First Amendment will be suppressed and the speaker punished, with far-reaching chilling effects on the dissemination of other valuable speech. If, on the other hand, the value test is correctly applied, an error in the application of the first two prongs that results in an incorrect finding that speech is obscene will not suppress speech that does have value. Careful judicial review to minimize the risk of erroneous factual findings is therefore critically important in the context of *Miller*'s third prong.

D. Applying the Value Test by Reference to Varying Community Standards Would Substantially Chill Speech That Has Serious Literary, Artistic, Political or Scientific Value.

In the many cases in which it has confronted problems raised by the regulation of obscenity, this Court has consistently ruled that the standards and procedures for distinguishing between protected and unprotected speech must be carefully drawn in order to assure that laws aimed at suppressing obscene speech will not also punish or chill speech protected by the First Amendment.[26] As we will show, the lower courts' adoption of

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[26] *See Roth v. United States*, 354 U.S. 476, 488 (1957); *Miller*, 413 U.S. at 23-24; *Bantam Books v. Sullivan*, 372 U.S. 58, 66 (1963); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 561 (1975); *Blount v. Rizzi*, 400 U.S. 410, 416 (1971); *A Quantity*

a community standard for determining whether speech has value is inconsistent with that rule, and will assuredly have a substantial chilling effect on speech that has serious literary, artistic, political or scientific value.

If laws authorizing criminal punishment for individuals engaging in unprotected speech do not provide adequate notice of the speech proscribed and allow a significant margin for error, then speakers will steer a very wide course away from the "unlawful zone." *Speiser v. Randall*, 357 U.S. 513, 526 (1958). This self-censorship is "a censorship affecting the whole public . . . . Through it, the distribution of all books, both obscene and not obscene, would be impeded." *Smith v. California*, 361 U.S. 147, 153-54 (1959). *See New York Times v. Sullivan*, 376 U.S. at 279-80.

The Court has long recognized the serious danger of self-censorship in the obscenity context, where the line between unlawful "obscenity" and constitutionally protected speech is unavoidably "dim and uncertain." *Bantam Books*, 372 U.S. at 66. That danger would be greatly aggravated if the value test were applied by reference to unarticulated and varying community standards.

For all speakers, but particularly those who live outside the relevant community, and national speakers who communicate in thousands of communities, the use of community standards makes it extraordinarily difficult, and in many cases impossible, to ascertain the "unlawful zone" of obscene speech. In discussing community standards, this Court's decisions have emphasized the great diversity of communities across this Nation [27] and have acknowledged that in identifying a particular community's standards each jury must "draw on knowledge of

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of Copies of Books v. Kansas, 378 U.S. 205, 212 (1964); *Marcus v. Search Warrants of Property*, 367 U.S. 717, 731 (1961); *Smith v. California*, 361 U.S. 147, 155 (1959).

[27] *Miller*, 413 U.S. at 30.

the community or vicinage from which [it] comes." [28] This knowledge obviously is not possessed by speakers outside the community and cannot practically be obtained. Indeed, the relevant community is not even specified in many state obscenity statutes.[29] Even in states that do specify a geographic community, those communities inevitably include countless subcommunities, and the speaker cannot know which of those subcommunities the jury may look to for guidance.[30]

In deciding whether or how to speak in a particular community, the speaker knows that a *single* mistake in ascertaining the standards of that community will subject the speaker to criminal penalties. To minimize that risk, speakers must steer a wide course away from the "dim and uncertain" line separating obscenity and protected speech in the many communities in which they are uncertain about the "community standard." In those communities, the speaker must operate under a presumption of community intolerance, limiting speech to

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[28] *Hamling*, 418 U.S. at 105; *see* note 21 *supra*.

[29] *See Jenkins v. Georgia*, 418 U.S. 153, 157 (1974) (states may refer to community standards "without further specification").

[30] *See, e.g.*, Bell, *Determining Community Standards*, 63 A.B.A.J. 1202, 1206 (1977) (This analysis of community standards polls "found that attitudes regarding the depiction of sexual matters vary markedly from one location in a city to another. For example, in one city there were residential areas where 90 per cent of the respondents felt that standards had changed in the past few years in the direction of greater acceptability regarding explicit sexual depictions in films. In the same city there were areas where only 20 per cent of the respondents noticed a change toward greater tolerance. Indeed, half of those respondents thought the changes were in the opposite direction."); *Court v. State*, 63 Wis.2d 570, 217 N.W.2d 676, 679 (1974) ("The Appleton area where this case originated as well as the obvious example of Milwaukee are areas where portions of what clearly are recognizable as integrated local communities would be governed by different standards. What would not be obscene on one side of the street might be obscene on the other.").

that which is accepted in the least tolerant communities —in other words, the lowest common denominator. Rather than accommodating the interests of diverse communities, the use of community standards effectively imposes on *all communities* the standards of the least tolerant.[31]

These difficulties acutely affect the practices of national speakers, such as national publishers and distributors of books. By entering the national marketplace of ideas, these speakers play a critical role in fostering the exchange of ideas between diverse communities.[32] But when confronted with the risk of criminal penalties for violating any of the thousands of unarticulated and varying community standards, they are forced to engage in self-censorship, avoiding speech in all communities

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[31] *See Community Standards, supra* note 6, at 1859 n.91 ("taken to extremes, least common denominator distributions create a uniform national standard—the standard defined by the attitudes of the least tolerant jurisdiction"). In addition to subjecting speakers to thousands of different standards, the use of community standards has a chilling effect on protected speech for other reasons. First, it creates a strong incentive for prosecutors to "forum shop" by commencing prosecutions in those areas with the least tolerant "community standards." Consequently, unless an objective standard is used speakers must assume that the value of their speech will be judged by the most parochial standards. Second, the use of community standards in the third prong would mean that an acquittal based on a finding of "value" in one community would have no collateral estoppel effect in a prosecution commenced in another community. Community standards thus increase the risk that a speaker will be subjected to multiple prosecutions. Because speakers cannot assume that no prosecutors will take advantage of these opportunities, the pressure to self-censor any speech that might be found obscene anywhere becomes even greater.

[32] *See Roth*, 354 U.S. at 484; *Associated Press v. United States*, 326 U.S. 1, 20 (1944); *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964).

that might approach the "dim line" between obscenity and constitutionally protected speech in any community.[33]

This chilling of constitutionally protected speech is caused by the use of community standards in deciding any of *Miller*'s three prongs. However, use of an objective standard in applying the third prong affords significant protection to speakers. If they can conclude that their speech clearly has "value" of the type specified in *Miller*—based on their own judgment, consultation with experts or law enforcement officials, or an examination of case law involving the same or similar speech—they can have *some* assurance that their speech will be constitutionally protected, no matter how idiosyncratic a particular community's standards concerning the "prurient interests" and "patently offensive" prongs may be. This limits, somewhat, the chilling effect on "valuable" speech of varying community standards.

Because the lower courts' ruling removes this protection, even those who engage in sexually explicit speech which they honestly believe has value cannot safely speak anywhere they are uncertain of the community's standards. The courts below have not provided the slightest justification, much less a compelling or overriding justification, for adopting a rule that predictably will lead to substantial self-censorship of protected—indeed of *valuable*—speech. That rule is fundamentally at odds with the First Amendment.

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[33] The recent decision in *Mozert v. Hawkins County Public Schools*, —— F. Supp. —— (E.D. Tenn., No. Civ-2-83-401, Oct. 24, 1986), 55 U.S.L.W. 2243 (Nov. 4, 1986) (permitting children to be excused from reading textbooks they and their parents find objectionable on religious grounds) has focused attention on the pressure to self-censor experienced by publishers in a national market. Even in textbook publication, where deviations from what is "valued" in diverse communities are not subject to criminal penalties, there has been widespread concern that textbooks are being "watered down" because they are "aimed at satisfying many and offending none." *Wash. Post*, Nov. 10, 1986, at A1.

II. THE COURT SHOULD LIMIT ITS HOLDING TO THE PRECISE ISSUE RAISED BY THIS CASE, BUT IF IT ADDRESSES OTHER ASPECTS OF THE VALUE TEST IT SHOULD RULE THAT BECAUSE THE VALUE REQUIREMENT IS AN EXCEPTION TO THE GENERAL RULE THAT SPEECH IS PROTECTED REGARDLESS OF ITS VALUE, THAT REQUIREMENT MUST BE NARROWLY CONSTRUED.

Amici respectfully submit that it would be unnecessary and inappropriate for the Court to address the precise meaning of "serious literary, artistic, political, or scientific value," in this case because that issue is not before the Court. If, however, the Court does address that issue, it should rule that because requiring sexually explicit speech to have value is itself an exception to the general rule that speech is protected regardless of its value, the value requirement must be narrowly construed.

The precise meaning of "serious literary, artistic, political, and scientific value," was not at issue below and is not raised in these appeals. Indeed, the *Miller* language is not even used in the Illinois test that is at issue. Hence, elaboration of that language would provide no guidance to the courts below if this case is remanded for further proceedings.

In these circumstances, it is axiomatic that the Court should not elaborate the meaning of "serious literary, artistic, political, and scientific value" in this case. The importance and complexity of constitutional adjudication require that the Court limit its decision to those issues properly and necessarily before it. Perhaps nowhere is this more evident than in obscenity cases, where the difficulty of the issues has frequently resulted in sharp divisions among the members of this Court. Issues raised by the phrase "serious literary, artistic, political and

scientific value" are no exception. They must be resolved on a case-by-case basis in the context of specific disputes, rather than through broad rules formulated in the abstract, without the benefit of briefing by the parties or resolution in the first instance by lower courts. Hence, the Court's holding should be limited to requiring that the value test (or variants of that test) must be applied using an objective standard, and the Court should await a more appropriate case before addressing other substantive aspects of that test.

If the Court does decide to provide further instruction concerning the interpretation and application of the "serious literary, artistic, political, and scientific value" test, however, it should rule that because this requirement is an exception to the general rule that speech is protected regardless of its value, the value requirement must be narrowly construed. The history of speech regulation teaches that any effort to identify speech that is not "valuable" should proceed with an awareness that it is extraordinarily difficult to make this determination using neutral principles, and that the principal victims of such efforts are often the speaker and recipient of unconventional or unpopular ideas. These lessons are deeply rooted in the Court's First Amendment jurisprudence, and are of paramount importance in the rare cases—such as obscenity—where the First Amendment has been construed to allow criminal punishment of speech based on its content and lack of "value."

In view of these principles, if the Court addresses the substance of the value test, *amici* urge it to do so in the following manner:

First, the Court should indicate that the four categories of "valuable speech" enumerated in *Miller* are not exhaustive, and should be construed flexibly.[34] Any at-

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[34] *See* Lockhart, *supra* note 6, at 555 (The four categories enumerated in *Miller* are "artificially limited in scope, apparently ex-

tempt to rigidly define "core" categories of speech protected by the First Amendment is ultimately doomed to failure. The interests protected by the Amendment are too broad, and the contexts in which they arise too varied, to allow such compartmentalization.[35] For example, a significant amount of educational speech, including sex education of an informational rather than scientific nature, would not easily fall within any of *Miller*'s four categories (and clearly would not be included if they are rigidly construed).[36] The *Miller* test,

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cluding important first amendment values . . . . [T]he omission of educational value, and some general expression such as 'other social value' to include genuine serious values that do not readily fit into the specified categories, is a critical deficiency in the [*Miller*] opinion.").

[35] Thus, in some cases, courts may need to consider a variety of contextual factors to determine whether speech is valuable. *See Kois v. Wisconsin*, 408 U.S. 229, 231 (1972) (*per curiam*) (in deciding whether speech is obscene, "[a] reviewing court must . . . look at the context of the material, as well as its content"); *Ginzburg v. United States*, 383 U.S. 463 (1966) (same). In a close case, for example, the fact that the material was expressly requested by the recipient, and paid for, would provide some indication of its value, and conversely the fact that it had been "thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials," *Miller*, 413 U.S. at 19, might provide some evidence that it was not valuable.

[36] *See* Lockhart, *supra* note 6, at 555 ("[E]ducational value [is] one of the prime first amendment values served by explicit sexual materials, which are now widely used in the more advanced types of sex education in private schools and churches, and in the training of sex counselors, doctors, and others."). In assessing the value of the material at issue in *Ginzberg v. United States*, 383 U.S. 463, 472 (1966), the Court emphasized that the material was not being distributed because of its "therapeutic or educational value," and noted that "[t]he Government does not seriously contest the claim that the book [would have] worth in such a controlled, or even neutral, environment." *See* Hunsaker, *supra* note

therefore, should leave lower courts some room to accommodate other important values protected by the First Amendment in appropriate cases.

Second, the Court should reaffirm the statement in *Roth* that sexually explicit speech is not *per se* lacking in value simply because its content pertains exclusively to sex. *See Roth*, 354 U.S. at 487 ("Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.").

Third, the Court should make clear that the word "serious" as used in *Miller*'s third prong does not require a *quantitative* judgment about the value of speech, but requires instead the judgment whether the speech *genuinely* has literary, artistic, political, or scientific value. *See Miller*, 413 U.S. at 23 ("courts must always remain sensitive to any infringement of *genuinely* serious, literary, artistic, political or scientific *expression*") (emphasis added).[37] In rejecting as not embodying the views of the Court's majority in any prior case the "utterly without redeeming social value" test of *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) (plurality opinion), and substituting its "serious . . . value" test, the *Miller* Court relied upon *Kois v. Wisconsin*, 408 U.S. 229 (1972) (*per curiam*), for the proposition that " '[a] quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication.' " 413 U.S. at 25 n.7 (quoting 408 U.S. at 231). Thus, *Miller*'s insertion of the word "serious" and rejec-

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6, at 916 (suggesting that material, otherwise obscene, may have "serious 'therapeutic' value in psychiatric treatment or in marriage counseling.").

[37] *See Community Standards*, *supra* note 6, at 1855 (advocating this interpretation of *Miller*).

tion of the plurality's test in *Memoirs* reaffirmed and embodied the principle of *Kois* that courts may find a work obscene only if any and all portions having value are merely a sham, lacking any rational relationship to the remainder of the work.[38] It does *not*, however, invite juries or judges who have found, for example, that material has genuine political value to adjudge further whether that political value exceeds some artificially established (and meaningless) quantum before it merits First Amendment protection. A quantitative rule would unduly risk the worst sorts of content- and viewpoint-based discrimination by the jury.

Fourth, for reasons indicated earlier, the Court should reaffirm the critical role played by judges in determining whether material has "serious literary, artistic, political or scientific value." [39]

CONCLUSION

In contrast to the many difficult and divisive issues that arise in the obscenity context, the issue now before the Court has been resolved with virtual unanimity by the lower courts. The Illinois courts departure from that otherwise unanimous view is inconsistent with the very design of the *Miller* test and violates four of the most fundamental principles of First Amendment jurisprudence, each of which requires the conclusion that *Miller*'s value test cannot constitutionally be applied by reference to community standards. Considered together,

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[38] *See Kois v. Wisconsin*, 408 U.S. at 231 (publication of sexually explicit photographs was constitutionally protected because it was "rationally related to an article that itself was clearly entitled to the protection of the Fourteenth Amendment").

[39] *See Smith v. United States*, 431 U.S. 291, 305 (1977); F. Schauer, THE LAW OF OBSCENITY 151 (1976).

those principles overwhelmingly justify that conclusion and require reversal of the judgment below.

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November 20, 1986

(Submitted With the Consent of the Parties)
No. 85-1973 (6)

Supreme Court, U.S.
FILED
NOV 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD POPE AND CHARLES G. MORRISON,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

BRIEF IN SUPPORT OF PETITIONERS OF VOLUNTEER LAWYERS FOR THE ARTS, INC., AS AMICUS CURIAE

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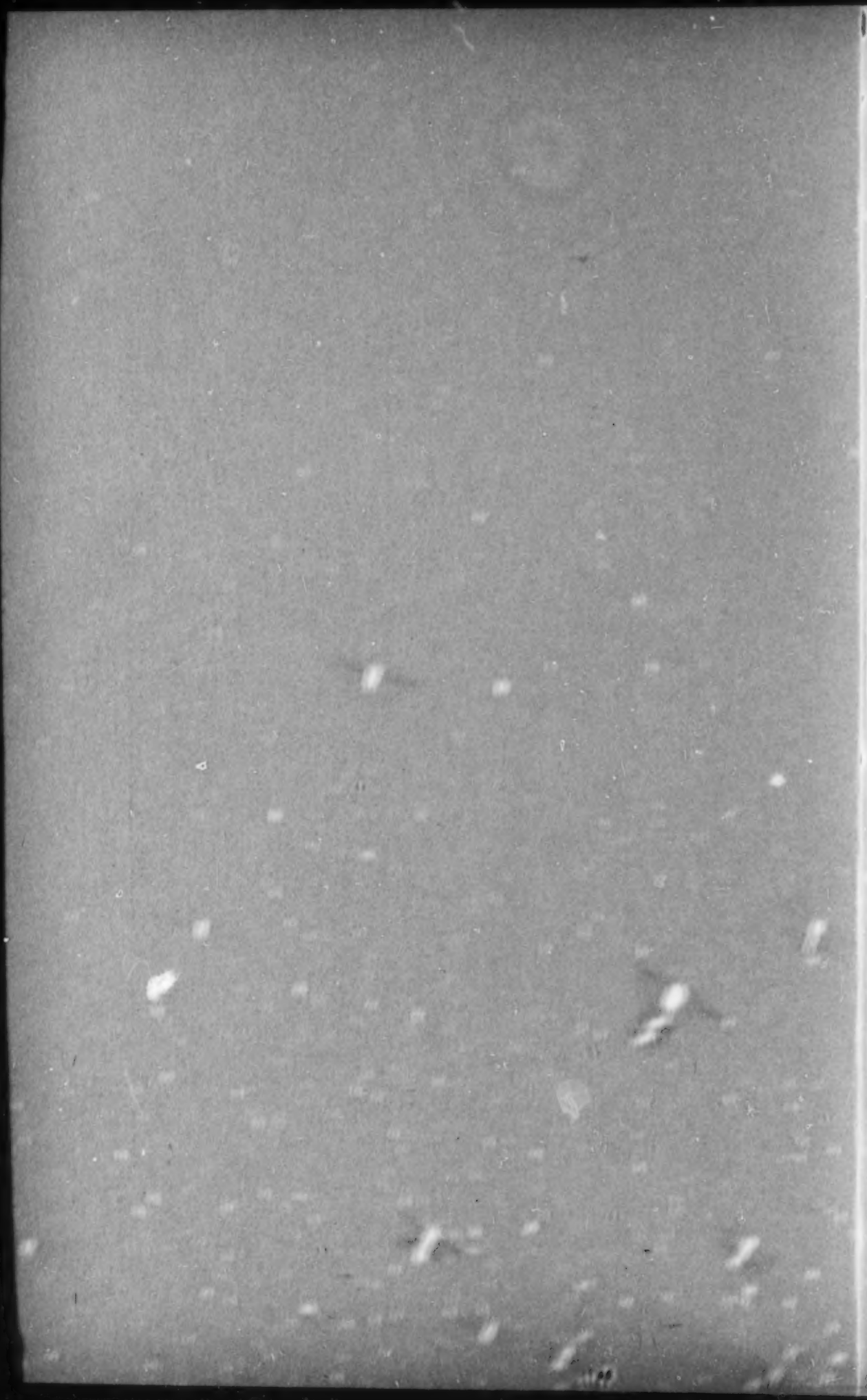

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	2
I. *Miller* Mandates an Objective "Value" Test	2
II. Subsequent Decisions	3
III. The First Amendment Requires an Objective "Value" Test	4
CONCLUSION	7

AUTHORITIES CITED

	Page
Bantam Books v. Sullivan, 372 U.S. 58 (1963) ...	6
Greenberg v. Bolger, 497 F. Supp. 756 (E.D.N.Y. 1980)	4
Hamling v. United States, 418 U.S. 87 (1974)	4
Lamont v. Postmaster General, 381 U.S. 301 (1965)	6
Miller v. California, 413 U.S. 15 (1973)	1, 2, 3, 5
New York Times v. Sullivan, 376 U.S. 254 (1964)	5
Penthouse Intern Ltd. v. McAuliffe, 610 F.2d 1354 (55th Cir. 1980)	3
Police Department of Chicago v. Mosley, 408 U.S. 92 (1972)	4
Red Lion Broadcasting Company, Inc. v. FCC 395 U.S. 367 (1969)	6
Smith v. California, 361 U.S. 147 (1959)	6
Smith v. United States, 431 U.S. 291 (1977)	2, 3, 4
Stanley v. Georgia, 394 U.S. 557 (1969)	6
United States v. Bagnell, 679 F.2d 826 (11th Cir. 1982)	3
United States v. Heyman, 562 F.2d 316 (4th Cir. 1977)	3
Wooley v. Maynard, 430 U.S. 705 (1977)	4
Young v. American Mini Theatres, 427 U.S. 50 (1975)	4

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BRIEF IN SUPPORT OF PETITIONERS VOLUNTEER LAWYERS FOR THE ARTS, INC., AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

Volunteer Lawyers for the Arts, Inc. ("VLA") is a not-for-profit organization which provides legal services and advice to many authors, artists and dramatists with respect to their contracts, copyrights and other matters, including their rights of free expression under the First Amendment.

Determination of the issue presented on this appeal may seriously affect those First Amendment rights. If the Court does not rule that the "significant value" test of *Miller v. California*,

413 U.S. 15, 24-25 (1973), must be judged on an objective basis and not by contemporary community standards, then many books, paintings, plays and other works of recognized literary, artistic, political or scientific value may be held obscene, or subjected to obscenity prosecutions that otherwise would not have been instituted.

Because the First Amendment rights of authors and artists it advises and assists may be affected by the Court's decision, VLA submits this brief amicus curiae, with the consent of the parties, urging that the court reverse the Illinois Appellate Court's decision that a work's significant value must be determined under contemporary community standards.

SUMMARY OF ARGUMENT

The Court's opinion in *Miller v. California* makes it plain that the "value" prong of its 3-part standard for defining obscenity shall be judged solely on an objective basis ("value" refers to literary, artistic, political or scientific value). Subsequent cases correctly held that the "value" of books at issue could not be determined by applying contemporary community standards. We also submit that the use of contemporary community standards to determine "value" would frustrate the First Amendment's fundamental purpose, sanctioning and stimulating suppression of works of significant "value" that are entitled to its protection.

ARGUMENT

I. Miller *Mandates an Objective "Value" Test*

In *Smith v. United States*, 431 U.S. 291 (1977), the Court stressed that the very language of the *Miller* test makes it "clear that contemporary community standards" apply only to the "prurient interest" prong, and that the *Miller* opinion "indicates that patent offensiveness is to be treated in the same way." 431 U.S. at 300-301.

The *Smith* opinion then reminds us that "Literary, artistic, political or scientific value is not discussed in *Miller* in terms of

contemporary community standards." *Id.* These statements leave no doubt that contemporary community standards were not to determine whether the book, painting or other work in the dock had significant literary, artistic, political or scientific value. If the Court had intended those standards be used to judge "value," it would have said so in *Miller*, or subsequently in *Smith*. Pointedly, it did not.

Indeed, *Smith* referred to the safeguards against a jury's misuse of community standards in determining if a work "fell within the substantive limitations suggested in *Miller*," and then stressed that in addition, "The work also must lack serious literary, artistic, political or scientific value before a conviction will be upheld; this determination is particularly amenable to appellate review," 431 U.S. at 305.

II. *Subsequent Decisions*

U.S. Courts of Appeal correctly have held that, under *Miller v. California*, contemporary community standards cannot be used to determine whether the accused work has significant "value".

In *United States v. Heyman*, 562 F.2d. 316 (4th Cir. 1977) the Court reversed a conviction because the District Court erroneously instructed the jury to apply contemporary community standards in determining if the accused work had significant "value"; the Court of Appeals said "Nowhere does the (*Miller*) opinion suggest that the scientific value of sexually oriented expression be adjudged on such a parochial basis." (316 F.2d at 318.) See also: *United States v. Bagnall*, 679 F.2d 826, 835 (11th Cir. 1982) (citing *Smith*); and *Penthouse Intern, Ltd. v. McAuliffe*, 610 F.2d 1354 (5th Cir. 1980) ["The first and second prongs of the Miller test apply contemporary community standards to questions of fact such as 'appeal to the prurient interest' and 'patent offensiveness.' (citing *Smith*). Contemporary community standards are not applied to the third prong of the *Miller* test. *Id.*" 610 F2d at 1363.

III. *The First Amendment Requires an Objective "Value" Test*

(1) The "value" prong of the Miller test recognizes that the First Amendment shields works of significant literary, artistic, political or scientific value from suppression under state or federal obscenity statutes. That constitutional protection would be frustrated if determinations of "value" were made according to contemporary community standards rather than on an objective basis.

Indeed, use of a contemporary community standard to determine the worth of a book or play or painting is repugnant to the First Amendment since "Protection of unpopular ideas is the very essence of the First Amendment." *Greenberg v. Bolger*, 497 F. Supp. 756 (E.D.N.Y. 1980). Chief Judge Weinstein's statement is well-grounded on the Court's decisions. *See, e.g., Wooley v. Maynard*, 430 U.S. 705 (1977) ["The First Amendment protects the right of individuals to hold views different from the majority," at 715]; *Young v. American Mini Theatres*, 427 U.S. 50 (1975) [Speech may not "be curtailed because it invites dispute . . . or even stirs people to anger (citation omitted)," at 64]; *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972).

While protection of "unpopular" and "minority" views is the "very essence" of the First Amendment, the essence of the "contemporary community standard" is just the opposite — to enforce the majority (the "popular") view that a work shall not be distributed or exhibited to those in the minority who wish to read or view it. In applying the community standard, jurors are supposed to draw on their "own knowledge of the views of the average person in the community," *Smith v. United States*, 431 U.S. 291, 302 (quoting *Hamling v. United States*, 418 U.S. 87, 104-105 (1974)).

Thus, if the significant value test were applied under the contemporary community standard, books, paintings, films and other works of objectively significant value could be suppressed in a community if a majority of its citizens — represented by 12 of their number, applying the majority's view — judged the work lacking in "significant value." This suppression could

occur no matter how unqualified their judgment, and despite the fact that a minority held the view that the work had significant value.

It is characteristic of significant works of literature and art that often they are not read or understood by a majority in many communitites. If the third prong of the *Miller* test were made to depend on the majority's view, it would utterly fail to preserve the First Amendment protection to which creative works of significant value are entitled, even though they are unpopular to a community's majority.

No less than in the case of libel, suppression of constitutionally protected speech dealing with sexual themes is accomplished as much by the threat of prosecution and by the burden of defending against unwarranted prosecution, as it is by the fear of ultimate conviction. *Cf.*, *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964). Indeed, the threat of censorship to – and self-censorship by – book stores, libraries, museums, schools, and motion picture theatres, is even greater, since they often cannot afford the burden or the stigma of defending the sale, exhibition or distribution of a given work that they correctly believe is, objectively, of significant literary or artistic value. Even though reputable critics, scholars, educators, or other qualified commentators recognize that the work has significant "value", the use of a contemporary community standard to determine its value would make the risk of conviction too great.

The possibility of reversal on appeal offers little comfort to a book store or school that cannot afford a trial, no less the appeal. Perhaps the most inhibiting effect of a community-standard test of value would be to increase the risk of prosecution in communities with little tolerance and low regard for the literary or artistic value of books or paintings or films that deal with sexual themes.

(2) It must be emphasized that the First Amendment interests at stake here transcend those of the author, artist or other creator of a challenged work, and of the publisher or film company that distributes it. At stake, too, are the rights of schools,

book stores, museums, libraries and theatres in a given community to disseminate or exhibit the work if it is not constitutionally obscene – rights fully protected by the First Amendment. *Smith v. California*, 361 U.S. 147 (1959); *Bantam Books v. Sullivan*, 371 U.S. 58 (1963).

Also at stake are the rights of adults in the countless communities of the United States who choose to read books, view motion pictures and see works of art dealing with sexual themes which qualified experts believe to have significant literary or artistic or scientific value. The right of a minority in any community to obtain and have access to those works in the community also is encompassed in the First Amendment. That right is violated when the majority's view that such a work lacks significant value is allowed to sustain a restraint on its distribution. *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Stanley v. Georgia*, 394 U.S. 557 (1969) ["It is now well established that the Constitution protects the right to receive information . . . freedom of [speech and press] necessarily protects the right to receive. (citations omitted)", at 564.]; *Red Lion Broadcasting Company, Inc. v. FCC*, 395 U.S. 367 (1969) ["It is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences, which is crucial here. That right may not be constitutionally abridged by Congress or by the FCC," at 390.]

We respectfully submit it is constitutionally impermissable to employ the community-interest standard to determine whether books, paintings, films and other works are so lacking in literary, artistic, political or social value as to be denied First Amendment protection against obscenity prosecutions, and banned from distribution or exhibition to adults who choose to read or view them, even when not disseminated to children or obtrusively exposed to unconsenting adults.

At the very minimum, we submit, the Amendment requires that this crucial determination as to significant value be made on an objective basis, relying on informed and qualified literary, artistic or scientific judgment.

CONCLUSION

It is respectfully submitted that the order appealed from should be reversed.

Respectfully submitted,

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No. 85-1973

Supreme Court, U.S.
FILED
NOV 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RICHARD POPE and CHARLES G. MORRISON,
Petitioners,

—v.—

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

ON WRIT OF CERTIORARI TO THE
APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

BRIEF OF AMERICAN BOOKSELLERS ASSOCIATION, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., NATIONAL ASSOCIATION OF COLLEGE STORES, INC. AND THE FREEDOM TO READ FOUNDATION, AS *AMICI CURIAE*, IN SUPPORT OF PETITIONERS.

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Statement	1
The *Amici*	1
Interest of the *Amici* and Summary of Argument	2
Argument -	
Access to Works Generally Acknowledged as Having Serious Literary, Artistic, Scientific or Political Value Will be Unconstitutionally Restricted if the Third Prong of the *Miller* Test is Tied to Local Community Standards	5
Conclusion	14

TABLE OF AUTHORITIES

	Page
Cases:	
American Council of the Blind v. Boorstein, No. 85-3836 (D.D.C. Sept. 23, 1986)	4, 11
Attorney General v. Book Named "God's Little Acre", 326 Mass. 281, 93 N.E.2d 819 (1950)	8
Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485 (1984)	1
Castle News Co. v. Cahill, 461 F. Supp. 174 (E.D. Wisc. 1978)	6
Council for Periodical Distributors Ass'n v. Evans, 642 F. Supp. 552 (M.D. Ala. 1986)	3
Jenkins v. Georgia, 418 U.S. 153 (1974)	13
Memoirs v. Massachusetts, 383 U.S. 413 (1966)	7
Miller v. California, 413 U.S. 15 (1973)	*passim*
Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973)	6
Penthouse Int'l v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980)	6
Playboy Enterprises, Inc. v. Meese, Nos. 86-1346, 86-1447 (D.D.C. July 2, 1986); 13 Med. L. Rptr. 1101	3
Smith v. United States, 431 U.S. 291 (1977)	6, 12

	Page
United States v. Bagnell, 679 F.2d 826 (11th Cir. 1982)	6
United States v. Heyman, 562 F.2d 316 (4th Cir. 1977)	6
United States v. Two Obscene Books, 99 F. Supp. 760 (N.D. Calif. 1951), *aff'd sub nom. Besig v. United States*, 208 F.2d 142 (9th Cir. 1953)	8
United States v. Ulysses, 72 F.2d 705 (2d Cir. 1934)	8
Other Authorities:	
Attorney General's Commission on Pornography, *Final Report* (July 1986)	3
A. Haight & C. Grannis, *Banned Books, 387 B.C. to 1978 A.D.* (4th ed. 1978)	8
R. Unger, *Knowledge and Politics* (1984)	9

STATEMENT

The American Booksellers Association, Inc.; the Association of American Publishers, Inc.; the Council for Periodical Distributors Associations; the International Periodical Distributors Association, Inc.; the National Association of College Stores, Inc.; and The Freedom to Read Foundation (collectively referred to as "*Amici*") submit this joint brief *amici curiae*, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, in support of petitioners. This joint brief is submitted upon the written consent of petitioners and respondent.[1]

THE *AMICI*

The *amici*'s members publish, distribute, sell and lend books, magazines, and other printed materials having serious literary, artistic, scientific and political value. These materials span a broad range of subjects and a variety of tastes, and include works that some might find controversial or offensive. The very diversity of these works speaks compellingly of the vital role performed by *amici*'s members in preserving "the freedom to speak one's mind . . . [which] is essential to the common quest for truth and the vitality of society as a whole." *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 503 (1984).

The American Booksellers Association, Inc. is the major national association of booksellers in the United States. It has approximately 5,200 members consisting of independent, department store, university and chain book stores.

The Association of American Publishers, Inc. is the major national association in the United States of publishers of general books, textbooks and educational materials. Its approximately three hundred members include most of the major commercial book publishers in the United States and many smaller or nonprofit publishers, including university presses and scholarly associations.

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[1] The original of petitioners' written consent by Glenn A. Stanko and the original of respondent's written consent by Mark L. Rotert are being filed herewith.

The Council for Periodical Distributors Associations is the national trade association for over five hundred independent local wholesale distributors of magazines, comic books, paperback books and newspapers in every state of the United States.

The International Periodical Distributors Association, Inc. is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

The National Association of College Stores, Inc. is a trade association composed of approximately 2,300 college stores located throughout the United States.

The Freedom to Read Foundation, a non-profit organization supported by voluntary donations, was established in 1969 by the American Library Association to promote and defend First Amendment rights; to foster libraries as institutions wherein every citizen's First Amendment freedoms are fulfilled; to support the right of libraries to include in their collections and make available any work which they may legally acquire; and to set legal precedent for the freedom to read on behalf of all citizens.

INTEREST OF THE *AMICI* AND SUMMARY OF THE ARGUMENT

Recent history has seen a burgeoning number of unconstitutional attempts to restrict access to First Amendment protected materials. While the attacks have taken a variety of forms and have not always been directed at the sexual content of publications, sexually-frank expression has been particularly besieged by those who would conform the nation's reading tastes and habits to their own parochial standards. Such attacks run contrary to our great constitutional tradition, which eschews conditioning speech either upon what a narrow segment of the community may view as acceptable or what majoritarian forces would dictate.

To cite but a few troubling recent examples, in Alabama, the District Attorney of the City of Montgomery embarked on an unlawful campaign to coerce bookstore and newstand owners from carrying *any future* issues of periodicals which he deemed objectionable, but were adjudged to be protected by the First Amendment.[2] At the national level, the Attorney General's Commission on Pornography ("Commission") branded convenience and drug store chains as purveyors of pornography, leading to a court order requiring the retraction of the charge and advice to the recipients that earlier communications from the Commission were of no legal effect and to be ignored.[3] In its subsequent July 1986 report, the Commission not only endorsed broad new law enforcement initiatives but also encouraged "private" censorship efforts as a "coercive force" to "control" the availability of materials concededly protected by the First Amendment.[4]

These and other similar unlawful efforts to restrict the availability of non-obscene, First Amendment protected materials were not directed at adult book stores or hard-core movie theaters. The targets of these efforts have been legitimate bookstores, newsstands, convenience stores and drug stores. These legitimate businesses, and the publishers and distributors that supply them, are the members represented by the *amici* trade associations.

The nation's libraries, whose interests are represented here by The Freedom To Read Foundation, have been subject to similar censorship pressures as those experienced by legitimate publishers, distributors and retailers. Public libraries — even the Library of Congress — have felt the sharp sting of censorship directed

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[2] *Council for Periodical Distributors Ass'n v. Evans*, 642 F. Supp. 552 (M.D. Ala. 1986)

[3] *Playboy Enterprises, Inc. v. Meese*, Nos. 86-1346, 86-1447 (D.D.C. July 2, 1986); 13 Med. L. Rptr. 1101.

[4] Attorney General's Commission on Pornography, *Final Report*, at pp. 419-23 (July 1986).

at works involving sexual expression.[5] Libraries, as publicly-funded institutions, are especially vulnerable to such pressures.

This rising agitation, directed against legitimate businesses and libraries handling First Amendment protected materials, makes particularly critical the signal to be given by this Court through its decision in this case. From early in the nation's history, it has been the celebrated mission of those who publish, distribute and lend printed materials to foster and disseminate the wide array of ideas that is the hallmark of a free society. Promoting the free exchange of ideas is undoubtedly the greatest service publishers, booksellers, librarians and their distributors can render. The effective fulfillment of that role requires an atmosphere of tolerance that rejects the imposition of moral, aesthetic, or political views of any one group upon individuals of opposing belief and allows for unorthodox and unpopular expression alongside the conventional.

In fending off attacks on works viewed by over-zealous prosecutors or community activists as objectionable, *amici*'s members have fundamentally relied upon the critical protections afforded by *Miller*. Specifically, the third prong of *Miller*, as consistently interpreted prior to the lower court's ruling in the instant case, has served to check parochial censorship efforts directed against works generally acknowledged to be of serious literary, artistic, political or scientific value. Because the third prong of the obscenity test has not been restricted to community standards, it establishes an objective bulwark — a safety net — defining the fundamental First Amendment limitation on a community's authority arbitrarily to restrict expression.

Were the Court to affirm the ruling below, the detrimental effects on *amici*'s members would be substantial. Moving from a standard which transcends parochial values to community-based standards of value would allow prevailing local sentiment to

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[5] *See, e.g., American Council of the Blind v. Boorstein*, No. 85-3836 (D.D.C. Sept. 23, 1986) (striking order of Librarian of Congress, responding to Congressional budget-cutting, to terminate Braille edition of *Playboy*).

dictate what publishers, distributors, booksellers and librarians shall offer to all.

Literature cannot thrive when it must be leveled to appeal to local tastes. The efforts of *amici*'s members to promote the free exchange of ideas envisioned by the First Amendment require a climate of toleration of diversity. This Court's affirmation that the third prong of the *Miller* standard transcends community sentiments as to value will help protect and nurture that climate.

ARGUMENT

ACCESS TO WORKS GENERALLY ACKNOWLEDGED AS HAVING SERIOUS LITERARY, ARTISTIC, SCIENTIFIC OR POLITICAL VALUE WILL BE UNCONSTITUTIONALLY RESTRICTED IF THE THIRD PRONG OF THE *MILLER* TEST IS TIED TO LOCAL COMMUNITY STANDARDS

(I)

Under the obscenity test enunciated in *Miller v. California*, 413 U.S. 15 (1973), legitimate publishers, booksellers and libraries have functioned confident in the knowledge that the obscenity laws do not apply to any work that has serious literary, artistic, scientific or political value. The *Miller* test, as heretofore uniformly applied, provides communities with adequate means to control materials that, taken as a whole, appeal to the prurient interest and depict sexual conduct in an offensive manner as judged by the standards of those communities, while at the same time providing a safeguard against parochial restrictions on works having serious literary, artistic, scientific or political value. The *Miller* test safeguards works having serious value by mandating that they be adjudged by a standard *not* restricted by the prevailing tastes of each particular community across the nation. In this fashion, the *Miller* test resolves the tensions between the community's desire to set the tone of community living and the constitutional imperative for unimpeded access to works having serious literary, artistic, scientific or political value.

Any break with this precedent will eviscerate the meaning of the First Amendment as a *federal* constitutional right, and force legitimate publishers and booksellers to conform to a multitude of value standards varying from community to community. Such a patchwork of parochial standards unrestrained by any objective safeguard for works of serious value would force publishers, booksellers and libraries to self-censor works that might be deemed "valueless" under the local standard of some community. It is impractical for a publisher to create numerous editions of its works tailored to a multitude of community value systems. The result of publishing for the lowest common denominator of community-determined value would be the loss of many works whose ideas "lift the spirit, improve the mind [and] enrich the human personality." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973).

This Court and the three federal courts of appeals to reach the issue have unanimously concluded that, under *Miller*, serious literary, artistic, political or scientific value is to be adjudged by a standard that is not limited to any particular community's sentiment. Thus, in *Smith v. United States*, 431 U.S. 291, 302 (1977), the Court observed that "[l]iterary, artistic, political, or scientific value . . . is not discussed in *Miller* in terms of contemporary community standards." *See United States v. Bagnell*, 679 F.2d 826, 835 (11th Cir. 1982) ("In applying the third part of the *Miller* test . . . the trier of fact is not supposed to rely upon contemporary community standards when evaluating the evidence"); *Penthouse Int'l v. McAuliffe*, 610 F.2d 1353, 1363 (5th Cir. 1980) ("Contemporary community standards are not applied in the third prong of the *Miller* test"); *United States v. Heyman*, 562 F.2d 316, 318 (4th Cir. 1977) ("Nowhere does [*Miller*] suggest that the scientific value of sexually oriented expression is to be judged on such a parochial basis"). *See also*, *Castle News Co. v. Cahill*, 461 F. Supp. 174, 179 (E.D. Wisc. 1978) ("[I]n applying the third prong, an objective standard must be used, *i.e.*, a standard that would remain constant in every corner of the United States").

These rulings are faithful to both the language and spirit of *Miller*, and represent the safeguard necessary to protect works having serious value from being banned because they offend parochial

sensibilities. The third prong of the *Miller* test creates a "safety net" that prevents prevailing local sensibilities from being the final arbiters of the scope of First Amendment protections.

The Court previously has rejected formulations of the obscenity test that would allow community fiats on offensiveness and prurient appeal to override the consideration of serious value:

> "Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness."

Memoirs v. Massachusetts, 383 U.S. 413, 419-20 (1966).

The evaluation of serious literary, artistic, political or scientific value thus establishes the ultimate common denominator of obscenity standards applied in every community throughout the nation. Considerations of prurient appeal and patent offensiveness obviously vary from urban to rural areas, and from region to region. The first two prongs of the *Miller* test recognize this obvious variation in local sensibilities. However, application of the *Miller* test has not exalted local peculiarities over serious literary, artistic, scientific or political value. The third prong reaches for more objective standards of merit that are susceptible of detached and reasoned analysis. The *Miller* test, as heretofore uniformly applied, insures that serious value remains a distinct and potent counterforce against the shifting tide of community sentiment.

A determination of value which is based on contemporary community standards is entirely too susceptible of collapsing into a question of *approval*. A definition of value based on contemporary community standards is likely to be only an extension of community sentiment that a work is prurient and offensive; value, after all, is an easy half-step away from taste. If the individual is to have an expansive choice of ideas — to receive expression of widely regarded value perhaps not currently appreciated by his community — *a priori* the community cannot be the definer of value.

Experience has demonstrated the myopia which can afflict purely community-based determinations of obscenity. Judging serious literary value, for example, on the basis of local community standards would revisit the pre-*Memoirs* period when individual communities banned as obscene such recognized works of serious literature as James Joyce's *Ulysses*, Erskine Caldwell's *God's Little Acre* and Henry Miller's *Tropic of Cancer* and *Tropic of Capricorn*. *See United States v. Ulysses*, 72 F.2d 705 (2d Cir. 1934); *Attorney General v. Book Named "God's Little Acre"*, 326 Mass. 281, 93 N.E.2d 819 (1950); *United States v. Two Obscene Books*, 99 F. Supp. 760 (N.D. Calif. 1951), *aff'd sub nom. Besig v. United States*, 208 F.2d 142 (9th Cir. 1953). *See also* A. Haight & C. Grannis, *Banned Books, 387 B.C. to 1978 A.D.*, (4th ed. 1978) (includes books banned by various governmental agencies).

In contrast to that era of erratic and unpredictable suppression of literature, the third prong of the *Miller* test has effectively defined the ultimate reach of First Amendment protection and thus circumscribes the authority of communities to control what their citizens may and may not read. In *Miller*, this Court confirmed that the scope of First Amendment protection is not wholly subsumed within local community standards:

> "Under a national Constitution, fundamental First Amendment limitations on the powers of the States *do not vary from community to community*, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive.' " (emphasis added)

Miller, 413 U.S. at 30.[6]

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[6] Even from the perspective of fostering community, the scope of First Amendment protection should not be wholly subsumed within local community standards. Communities unquestionably require a certain commonness of belief in order that the group become a "community," as that word signifies in its fullest sense. That common bond can be fostered by a variety of acceptable means, for example by persuasion. However, "strong community" does not require

(Footnote Continued)

If serious literary, artistic, scientific and political value were to be adjudged by local community standards, then fundamental First Amendment limitations *would* vary from community to community. No principle is more central to the First Amendment than the preservation of ideas, however unpopular or controversial. A broad-based standard is necessary to insure that, uniformly across the nation, no works of serious value which contribute to the exposition of ideas are denied constitutional protection.

(II)

Failure to maintain a uniform boundary against encroachments on First Amendment protections would have a serious impact on the publishing and library communities. Faced with the prospect of obscenity prosecutions based entirely on the prevailing parochial tastes in each individual community, businessmen and librarians would have only one rational response: self-censorship regardless of objective literary, artistic, scientific or political value. The effect would be both local and national in scope.

Without an objectively based standard for judging serious value, national publishers, distributors and retailers of widely circulated works would effectively be constrained from handling any work that might be deemed "valueless" by the prevailing opinion of some individual community. The practical impossibility of restricting the distribution of works according to varying local community standards would produce a "national" standard defined by the most restrictive communities.

Publishers, booksellers and librarians have operated on the understanding that obscenity laws cannot be invoked so long as a work, analyzed in a detached and reasoned manner, is recognized as having serious literary, artistic, scientific or political value.

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excluding all ideas offensive to community leaders. As political philosophers supportive of "community" have recognized, that invites stagnation of thought, not community. *See* R. Unger, *Knowledge and Politics* 286-88 (1984). Thus, while the *Miller* test properly takes into account the varying views of different communities on questions of prurience and offensiveness, no community should be allowed to exclude ideas widely recognized as valuable outside of that group — for those ideas present the continuous challenge that keeps community views vital.

Thus, a librarian, bookseller or college store is not required to censor controversial works of serious value that many, or even most, local residents may find to be "valueless." This is the essence of the protection of the First Amendment.

If literary, artistic, scientific and political value were to be defined by local community sentiment, then the ultimate scope of First Amendment protection would constantly be in flux and often unpredictable. So long as there is an objective safeguard for works having serious value, it is of relatively little moment that community standards for prurient appeal and patent offensiveness are fluid. If, however, all three prongs of the obscenity test were to be judged by those fluid community standards, then publishers, booksellers and librarians would have no fixed guidepost defining the limits of First Amendment protection. The *amici's* members will err on the side of over-restrictiveness rather than risk criminal prosecution.

Defining obscenity solely in terms of community standards would allow and perhaps even encourage local activist groups, assertedly representing "prevailing" community sensibilities, to coerce the censorship of bookstore stocks and library collections. College stores routinely stock required reading texts that might well be considered "valueless" and offensive in the surrounding local communities, although those works are elsewhere recognized as having serious literary value. No unwilling member of the local community is forced to read these "valueless" works. Local residents therefore should not be able to impose their sensibilities to restrict access to works that are objectively recognized as having serious literary, artistic, scientific or political value.

(III)

Publicly funded libraries, which constitute an irreplaceable resource giving substance to the First Amendment rights of all citizens, are also particularly subject to coercion by those local residents who would censor what their neighbors may read. Libraries are extremely vulnerable to pressures exerted during

the budgetary process at every level of government.[7] Given this institutional fragility, it requires little imagination to recognize that local disputes over the acquisition of controversial works having serious value could easily result in severe pressures on library funding and management. Judging all three prongs of the *Miller* test in accordance with community standards would so muddy the obscenity test that local activists would be emboldened to challenge a library's acquisition of any work locally deemed to be controversial regardless of the work's generally accepted serious value. The filing of a single obscenity action — civil or criminal — against a library would irreparably chill that library's future collection development. As a matter of community relations, no public library can afford to defend against an obscenity action.

Moreover, librarians — who are public employees — have no economic incentive, and in fact have a strong economic disincentive, to purchase and make available works of serious value that vocal residents nonetheless view as being beyond the pale of First Amendment protections. Librarians accordingly look to the safe harbor provided by an objective evaluation of serious artistic, literary, scientific and political value.

Judging all three elements of the obscenity test by unpredictable local standards varying over time and from community to community would also raise insuperable administrative barriers to interlibrary loans. The emergence of the Information Age means that no single library, not even a great one, can aspire to serve as the complete record-keeper of our civilization. It is through library consortia and bibliographic networks that today's libraries provide the nation with the intellectual resources it requires. These networks and consortia often represent libraries in diverse communities, both urban and rural, and generally interstate as well as

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[7] *See, e.g., American Council of the Blind v. Boorstein*, No. 85-3836 (D.D.C. Sept. 23, 1986) (striking order of Librarian of Congress, responding to Congressional budget-cutting, to terminate Braille edition of *Playboy*).

intrastate.[8] Thus, a consortium library in New York City which sends materials to an institution in Hartford, Connecticut or Dover, Delaware must be able to rely on a nonparochial evaluation of the serious value of any work it provides. The alternative would require the sending library to implement a number of expensive procedures, including obtaining a legal opinion from the receiving institution on the status of any requested work arguably subject to prosecution. The cost of such steps would have a disastrous impact on the development of cooperative library services.

(IV)

The role of the third *Miller* prong as a safety net preventing parochial sensibilities from overriding the determination of serious literary, artistic, scientific and political value is reflected in the appellate review of obscenity rulings. Broader appellate review has uniformly been accorded to findings under the third element of *Miller*. This Court has thus stated that findings as to serious value are "particularly amenable to appellate review." *Smith v. United States*, 431 U.S. 291, 305 (1977). This greater judicial scrutiny recognizes that the standard for determining serious value is one of the "fundamental First Amendment limitations . . . [that] do not vary from community to community." *Miller*, 413 U.S. at 30.

Whether a particular work has prurient appeal or is patently offensive in some isolated community is a question of fact reasonably reviewable on appeal only to the extent of determining whether the work could, as a matter of law, ever have prurient appeal or be patently offensive. No appellate court, removed from the relevant community, can be a better judge of a particular community's standards than the jury and trial judge drawn from that

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[8] Interstate multitype library networks have been organized throughout the nation to meet current demands for library services. For example, the New England Library and Information Network (NELINET) serves Connecticut, Maine, Massachusetts, New Hampshire and Vermont. The Southeastern Library Network (SOLINET) serves Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee and Virginia.

community. Findings under the first two *Miller* prongs therefore are subject only to the most limited appellate scrutiny.

In *Jenkins v. Georgia*, 418 U.S. 153 (1974), for example, the Court held that the film "Carnal Knowledge" "could not, as a matter of constitutional law, be found to depict sexual conduct in a patently offensive way, and that it is therefore not outside the protection of the First and Fourteenth Amendments because it is obscene." 418 U.S. at 161. In essence, the Court ruled that there was no question of fact established for the jury's determination and therefore the jury's finding of patent offensiveness could be overturned.

Even if the level of appellate review applied in *Jenkins* may ultimately protect those parties convicted of obscenity crimes that appear before this Court, the decision in *Jenkins* could not realistically prevent self-censorship by publishers, booksellers and libraries if all three prongs of the obscenity test were to be adjudged by local community standards. The fact that prurient appeal and patent offensiveness are determined by local community standards has not constrained the legitimate publishing industry because the third prong of the *Miller* test protects *any* work having serious value, *even if* a jury panel believes that the work appeals to the prurient interest and is patently offensive in that particular community. So long as serious value is not adjudged by local community standards, the very narrow appellate review accorded to findings of prurient appeal and patent offensiveness will continue to have little practical effect on the publication and distribution of legitimate works having serious value. This is as it should be – an obscenity test should not impinge on access to works generally recognized as having serious value.

Redefining serious value in terms of local community standards would permit obscenity convictions to evade meaningful appellate review. A jury that has found a work to have prurient appeal and to be patently offensive is likely to simply extend that sentiment to find that the work has no serious value *in that community*. Each individual community across the nation in each obscenity prosecution would newly reinvent the definition of serious literary,

artistic, scientific and political value, and would newly redefine the scope of the First Amendment. What is generally acknowledged to be a work of serious value throughout the nation could nonetheless be banned as obscene by some individual community. Framing the obscenity test entirely in terms of local community standards would eliminate the third prong as an objective safeguard of fundamental First Amendment protections and ultimately prescribe what a person may read solely by the prevailing views of a majority of his neighbors.

CONCLUSION

For the reasons set forth above, we respectfully urge this Court to uphold the precedent that serious literary, artistic, scientific and political value is determined without reference to local community standards, and to reverse the order of the Appellate Court of Illinois, Second District.

Respectfully submitted,

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No. 85-1973

Supreme Court, U.S.
FILED
DEC 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1986

RICHARD POPE and
CHARLES G. MORRISON,

Petitioners,

vs.

STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE
APPELLATE COURT OF ILLINOIS,
SECOND DISTRICT

AMICUS CURIAE BRIEF OF THE CITY OF SANTA ANA, CALIFORNIA, IN SUPPORT OF RESPONDENT

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December 1986

SUBJECT INDEX

INTEREST OF AMICUS CURIAE CITY OF SANTA ANA IN SUPPORT OF RESPONDENT,..... 1

STATEMENT OF THE CASE,..... 6

SUMMARY OF ARGUMENT,..... 9

ARGUMENT

I

APPLYING THE ANALOGY USED BY JUDGE LEARNED HAND THAT THE DETERMINATION OF OBSCENITY IS LIKE THE DETERMINATION OF THE STANDARD OF CARE IN NEGLIGENCE CASES, THE TRIAL JUDGE WAS CORRECT IN INSTRUCTING THE CRIMINAL JURY ON "SOCIAL VALUE" IN TERMS OF THE COMMUNITY STANDARDS OF THE STATE OF ILLINOIS.,..... 13

II

PETITIONERS' SECOND CHALLENGE-- THAT THE ILLINOIS STATUTE CANNOT BE CONSTITUTIONALLY APPLIED TO THE DEFENDANTS AND THE SUBJECT MATTER-- PLACES IN ISSUE THE NATURE AND SCOPE OF THE FEDERAL REVIEW OF STATE OBSCENITY DETERMINATIONS. ON THAT ISSUE, AMICUS URGES THIS COURT TO ADOPT THE HARLAN "RATIONALITY" TEST EXPRESSED IN JACOBELLIS V. OHIO, UNDER WHICH PETITIONERS' CONSTITUTIONAL CLAIM MUST BE REJECTED..... 23

(A) Under Justice Harlan's Test For Federal Review Of Federal Obscenity Determinations, The Federal Statutes May Only Proscribe "Hard-Core Pornography"..... 26

(B) Under The "One People" Concept The Federal Government Has Primary Jurisdiction Over "Hard-Core Pornography" (Harlan's View)..... 31

(C) Under Justice Harlan's "Rationality" Test For Federal Review Of State Obscenity Determinations, The Petitioners' Constitutional Claims Must Be Rejected..... 39

III

THE ATTEMPT OF AMICUS CURIAE TO CONTAIN "HARD-CORE PORNOGRAPHIC EXHIBITIONS" IN SANTA ANA HAS BEEN MADE MORE DIFFICULT BY A LACK OF ENFORCEMENT OF THE FEDERAL LAWS AGAINST "HARD-CORE PORNOGRAPHY". THIS COURT SHOULD ADDRESS THAT PROBLEM AND ENUNCIATE A STRONG JUDICIAL POLICY AGAINST THE EXHIBITION OF "HARD-CORE PORNOGRAPHY"..... 41

CONCLUSION,..... 43

CERTIFICIATE OF SERVICE,..... 45

TABLE OF AUTHORITIES CITED

CASES

Champion v. Ames, 188 U.S. 321 (1903),... 35

City of Youngstown v. DeLoreto, 251 N.E. 2d 491 (1969),..... 18

Hoke v. U.S., 277 U.S. 308 (2/24/13),.... 31

Jacobellis v. Ohio, 378 U.S. 184,.....
..... 6, 11, 23, 24, 25, 39

Kingsley Books, Inc. v. Brown, 354 U.S.
436 (6/24/57),..... 19

Memoirs v. Mass, 383 U.S. 413,..... 9

Miller v. California 413 U.S. 15 (1973) 6, 8, 29

Morris v. U.S., 257 A.2d 341 (1969)..... 11, 25

New York v. P.J. Video, Inc., ___ U.S. ___
89 L.Ed.2d 871,..... 40

Paris Adult Theatre I v. Slaton, 413 U.S.
49 (1973),..... 37, 38

People v. Birch All State News, et al.,
269 N.Y.S.2d 752 (5/2/66), reversing 40
Misc.2d 626, 243 N.Y.S.2d 525 (9/6/63), 19

People ex rel. Busch v. Projection Room
Theater, 17 Cal.3d 42 (1976),..... 2

Regina v. Hicklin, L.R. 3 Q.B. 36,..... 14

Smith v. U.S. ___ F.2d ___ (1976),..... 16, 38

Smith v. U.S., 431 U.S. 291 (1977),..... 16

State of Hawaii v. Kam, 726 P.2d 263 (10/
9/86),..... 18

U.S. v. Dennett, 39 F.2d 564,..... 19

U.S. v. Kennerley, 209 Fed. 119 (S.D.N.Y.,
1913),..... 6, 14

U.S. v. Levine, 83 F.2d 156 (1936),..... 6, 15

U.S. v. Roth, 354 U.S. 476 6, 11, 14, 28, 30, 31

U.S. v. 37 Photographs, 402 U.S. 363..... 26, 27

Ward v. Illinois, 431 U.S. 767,..... 8

Warsaw v. Eastman Kodak Co., 252 S.E.2d 182 (1979),..... 27

Zeitlin v. Arnebergh, 59 Cal.2d 901,..... 2

STATUTES, ORDINANCES, RULES

Illinois Revised Statutes, 1983, Ch. 38, para. 11-20(a)(1)..... 6, 7, 8, 13, 23

United States Codes
18 U.S.C. §§ 1461-1465,..... 28
18 U.S.C. §1735,..... 28
18 U.S.C. §1737,..... 28
19 U.S.C. §1305(a),..... 27, 28

Acts of Congress
37 Stat. 1511-1515, 1911 "Agreement for the Suppression of the Circulation of Obscene Publications"..... 29

81 Stat. 253, Public Law 90-100, Sec. 1 29, 30

Hearings Before The Subcommittee on Criminal Law and Procedures of the Committee on the Judiciary, United States Senate, 92nd Congress, First Session (The "One People" Concept)..... 32, 33

IN THE

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SECOND DISTRICT

AMICUS CURIAE BRIEF OF THE CITY OF SANTA ANA, CALIFORNIA, IN SUPPORT OF RESPONDENT

For the past ten years, the City of Santa Ana has been engaged in continuous obscenity litigation with the Mitchell

Brothers' Santa Ana Theater in Santa Ana, seeking through civil public nuisance abatement litigation to abate the exhibition of hard-core pornographic films being exhibited daily at the Mitchell Brothers' Theater. Operators of the theater freely admit that they exhibit nothing but "hard-core pornography". Continuous weekly surveillances by the City during that ten year period confirm the truthfulness of the Mitchell Brothers' open admission. Under California law, the exhibition of "hard-core pornographic" films is unlawful. See Justice Tobriner's opinion in Zeitlin v. Arnebergh, 59 Cal.2d 901 (1963). Under California law, "hard-core pornography" is also a public nuisance per se. See Justice Richardson's opinion in People ex rel. Busch v. Projection Room Theater, 17 Cal.3d 42 (1976).

During the 1981, 1982 and 1985 October Terms of this Court, Amicus Curiae has attempted, without success, to place its problem before this Court for a resolution of the fundamental issue of "closure" of a place which deals only in "hard-core pornography", as a public nuisance. See "Petition for Writ of Certiorari" in People ex rel. Cooper, City Attorney of the City of Santa Ana v. Mitchell Brothers' Santa Ana Theater, et al., October Term, 1981, No. 81-271; "Petition for Writ of Certiorari" in Edward Cooper, City Attorney of Santa Ana v. Mitchell Brothers' Santa Ana Theater, et al., October Term, 1982, No. 82-345; "Petitioner's Reply and Supplemental Brief" in No. 81-271; "Petitioner's Motion for Leave to File Out-of-Time Petition for Rehearing, With Petition for Rehearing Annexed", October Term,

1981, No. 81-271; "Petition for Writ of Certiorari" in People of the State of California ex rel. Cooper, City Attorney of the City of Santa Ana v. Mitchell Brothers' Santa Ana Theater, et al., October Term, 1985, No. 85-439; and "Petition for Rehearing", October Term, 1985, No. 85-439. More recently, during the 1986 October Term of Court, Amicus Curiae has been equally unsuccessful in requesting this Court to address that unresolved issue through other cases on this Court's calendar. See Amicus Curiae Brief of the City of Santa Ana, California, in support of Petitioners in People of the State of New York, ex rel. Arcara v. Cloud Books, Inc., October Term, 1986, No. 85-437; and in City of Paducah, et al. v. Investment Entertainment, Inc., October Term, 1986, No. 86-307. This Court's unwillingness, at this time, to address the "closure"

issue in relation to "hard-core pornography" has made it more difficult for Amicus Curiae to contain the exhibition of "hard-core pornography" in Santa Ana and carry on the public nuisance abatement litigation in the California State Court System.

In this Brief, Amicus Curiae urges this Court to use its grant of certiorari in Pope v. Illinois and Morrison v. Illinois, No. 85-1973 as a vehicle to enunciate a strong judicial policy in support of this nation's federal obscenity laws and, concomitantly, to derive and construct an analysis which will produce a catalyst at the federal level for the suppression of "hard-core pornography", which is the crux of Amicus Curiae's problems in Santa Ana, California. This the Court can accomplish by: (1) applying tne analogy of "negligence" and "due care"

used by the late Judge Learned Hand in U.S. v. Kennerley, 209 Fed. 119 (S.D.N.Y., 1913) and in U.S. v. Levine, 83 F.2d 156, 157 (1936); and (2) by adopting the analysis, and applying the two separate and distinct tests for the federal review of state and federal obscenity determinations, expressed by Associate Justice Harlan in U.S. v. Roth, 354 U.S. 476 at 496-509, and in Jacobellis v. Ohio, 378 U.S. 184 at pages 203-204.

STATEMENT OF THE CASE

The question presented herein is: "Whether contemporary community standards are to be applied to the value element of the tripartite test for obscenity articulated in Miller v. California, 413 U.S. 15 (1973)."

Pope was charged with three counts of obscenity (Ill. Rev. Stat., 1983, Ch.

38, para. 11-20(a)(1)) for the sale of three obscene magazines "Full Throttle", "Fuck Around" and "Anal Animal" on July 21, 1983 at an adult book store located at 623 7th Street, Rockford, Illinois. Morrison was charged with three counts of obscenity (Ill. Rev. Stat., 1983, Ch. 38, para. 11-20(a)(1)) for the sale of three obscene magazines "Solo Suckoff", "Rubber Suckers" and "She-Male Subjugation" on July 21, 1983 at an adult book store located at 519 W. State Street, Rockford, Illinois.

At jury trials, both defendants were found guilty on all three counts. In each case, a pre-trial motion to dismiss was filed which asserted, among other things: (1) that the three magazines were constitutionally protected (Motion to Dismiss at para. 6); and (2) that the Illinois obscenity statute was unconstitutional in that it failed

to require that the element of "utterly without redeeming social value" be judged solely with reference to an objective standard, as opposed to reference to a contemporary community standard (Motion to Dismiss at para. 2(c)(ii) (J.A. 6-10, 20-24)). The motions were denied and confirmed by the trial court's refusal to grant the separate written post-trial motions filed on behalf of the defendants (J.A. 1, 3, 15-17, 27-30). See also, "Statement of the Case" in Brief for the Petitioners at page 3.

The Illinois Obscenity Statute, Illinois Revised Statutes, 1983, chapter 38, §§ 11-20, as construed by the Illinois Supreme Court in Ward v. Illinois, 431 U.S. 767, applies the constitutional standards enunciated in Miller v. California, 413 U.S. 15, except that the Illinois Statute

retained the "utterly without redeeming social value" test of Memoirs v. Mass, 383 U.S. 413 at 419 in place of the "lacks serious literary, artistic, political, or scientific value test" of Miller, supra.

Petitioners Pope and Morrison contend: (1) that the Illinois Obscenity Statute is constitutionally infirm on its face because it permits the jury in a criminal trial to apply the community standards of the State of Illinois to the "value" component of the Illinois test for obscenity (Brief for Petitioners, Point I); and (2) that the Illinois Obscenity Statute is unconstitutional as applied to the defendants and the six (6) magazines involved (Brief for Petitioners, Point II).

SUMMARY OF ARGUMENT

In the trials of Pope and Morrison

below, the trial judge decided the legal question in the motion to dismiss before trial. The trial court's denial of the defendant's motion to dismiss was a holding that the subject matter was not constitutionally protected. Procedurally, it was therefore proper for the trial court to submit the question of "value" to the criminal jury on the factual question, based upon the Illinois community standard. Because of the procedural history, the Illinois Statute, as applied below is not subject to attack in this Court on the grounds alleged; i.e., that the statute is infirm on its face because of a failure to employ an objective standard.

The Petitioners have also challenged the Illinois Obscenity Statute as applied to the defendants and the subject matter involved (Brief for the Petitioners at pages 29-32). That

challenge raises a further constitutional question as to the scope of this Court's jurisdiction in reviewing such state determinations.

Amicus Curiae contends that the proper scope for federal review of state determinations is that set forth by Justice Harlan in his opinions in U.S. v. Roth, supra, and Ohio v. Jacobellis, supra. Under Justice Harlan's view, different tests are applied to federal and state statutes, because under the Federal Constitution, federal statutes may only proscribe that subject matter which is "hard-core pornography". See here, the test for "hard-core pornography" set forth in Morris v. U.S., 257 A.2d 341 (1969): "reasonable men could not differ and they could come to but one conclusion; i.e., that the material or performance is sexually morbid, grossly perverse, and bizarre,

without any artistic or scientific purpose or justification".

Under Justice Harlan's view, the test for reviewing state obscenity determinations is simply one of "rationality". Under that "rationality" test, an examination of the Illinois Statute and six (6) magazines in question require that the petitioners' constitutional claims be rejected.

Further, were a federal statute being applied, that claim would also fail because the subject matter would qualify as "hard-core pornography" under the federal standard for review of federal determinations.

ARGUMENT

I

APPLYING THE ANALOGY USED BY JUDGE LEARNED HAND THAT THE DETERMINATION OF OBSCENITY IS LIKE THE DETERMINATION OF THE STANDARD OF CARE IN NEGLIGENCE CASES, THE TRIAL JUDGE WAS CORRECT IN INSTRUCTING THE CRIMINAL JURY ON "SOCIAL VALUE" IN TERMS OF THE COMMUNITY STANDARDS OF THE STATE OF ILLINOIS.

At Point I of the Brief of Petitioners, a claim is made that the Illinois Obscenity Statute (Ill. Rev. Stat., 1983, Ch. 38, para. 11-20(a)(1)) is constitutionally infirm because it permits the jury in a criminal trial to apply a state community standard to the "value" component of the Illinois test for Obscenity, rather than an "objective" standard. That objection is not well taken because, from a procedural standpoint, the jury was only making a factual determination of what is obscene under Illinois law. It was not making a constitutional determina-

tion of what is protected material under the First Amendment to the Federal Constitution.

Historically, the constitutional standard expressed by Justice Brennan in Roth v. U.S., 354 U.S. 476, had its genesis in an opinion written by Judge Learned Hand, U.S. v. Kennerly, 209 Fed. 119 (S.D.N.Y., 1913), often called the "architect" and "father" of modern obscenity law. In that decision, Judge Learned Hand disapproved of the rule in Regina v. Hicklin, L.R. 3 Q.B. 36, and originated the rule that the determination on "obscenity" was a jury question, drawing an analogy to the standard of care in negligence cases, as a jury question. In U.S. v. Kennerly, 209 Fed. 119 (S.D.N.Y., 1913), Justice Learned Hand had tne following to say in this regard, at page 121:

". . . If there be no abstract

> definition such as I have suggested, should not the word 'obscene' be allowed to indicate the present, critical point in compromise between candor and shame at which the community may have arrived here and now? If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that a jury should in each case establish the standard much as they do in cases of negligence. . . .
>
> " Nor is it an objection, that such an interpretation gives to the words of the statute a varying meaning from time to time. Such words as these do not embalm the precise morals of an age or place; while they presuppose that some things will always be shocking to the public taste, the vague subject-matter is left to the gradual development of general notions about what is decent. A jury is especially the organ with which to feel the content comprised within such words at any given time, but to do so they must be free to follow the colloquial connotations which they have drawn up instinctively from life and common speech."

In a later case, U.S. v. Levine, 83 F.2d 156, 157 (1936), cited in Roth-Alberts, 354 U.S. 476 at footnote 26, as consistent with the obscenity law expressed therein, Judge Hand called the

verdict on "obscenity" a "small bit of legislation ad hoc, like the standard of care which the Constitution imposes on a jury as a 'duty'", at page 157:

> " As so often happens, the problem is to find a passable compromise between opposing interests, whose relative importance, like that of all social or personal values, is incommensurable. We impose such a duty upon a jury (Rosen v. United States, supra, 161 U.S. 29, 42, 16 S.Ct. 434, 480, 40 L.Ed. 606), because the standard they fix is likely to be an acceptable mesne, and because in such matters a mesne most nearly satisfies the moral demands of a community. . . . . Thus, 'obscenity' is a function of many variables, and the verdict of the jury is not the conclusions of a syllogism of which they are to find only the minor premise but really a small bit of legislation ad hoc, like the standard of care." (Emphasis provided.)

The role of the juror in criminal obscenity cases, as explained by the late Associate Justice Tom C. Clark, Retired, sitting by designation in Smith v. U.S., ___ F.2d ___ (1976), affirmed in Smith v. U.S., 431 U.S. 291 (1977)

is:

" In support of his contention that he had a right to propound such questions to the jury panel on voir dire, Smith seems to say that as a matter of due process he has a 'right to inquire of the juror what "contemporary community standards" the juror has knowledge of, if any, and just which of the multiple "contemporary community standards" the juror will apply to him, and the nature of the "contemporary community standards" which the juror believes have application to him.' But it is for the jury under the instructions of the trial judge to determine whether the material under scrutiny, taken as a whole, appeals to the prurient interest; whether it depicts sexual conduct in a patently offensive way; and, finally, if taken as a whole, it lacks serious literary, artistic, political or scientific value. But this definition of obscenity is 'one of law*** a legal term of art,' Hamling v. United States, 418 U.S. 87, 118 (1974), not one of fact. Jurors pass on facts, not law. The juror reaches his verdict by applying the definition of obscenity given him by the judge to the facts introduced into evidence, on a contemporary community standard. He draws on his own knowledge as to the views of the average person in the community, just as he does when he determines the propensities of the 'resonable' or 'average' person in other areas of decision making. Jurors do not have such standards on their

> tongues; nor do they wear them on their sleeves; they are inborn and often undefinable." (Our emphasis.)

For an example of the confusion which has crept into this area of the law, see State of Hawaii v. Kam, 726 P.2d 263 (Oct. 9, 1986) where the Hawaii Supreme Court erroneously held that, before the criminal jury could apply the obscenity statute to the defendant's conduct, it must find that a contemporary community standard existed, rather than that the jury must "determine" the contemporary community standard and apply it to the defendant's conduct. See, City of Youngstown v. DeLoreto, 251 N.E.2d 491 (1969) for a correct example as to how the community standards are derived. In DeLoreto, the Ohio Court of Appeals held that the network of state laws on sexual morality establish the moral standards of the people of Ohio.

To say that obscenity is primarily a question of fact for the jury is not to suggest, that in every instance such is the case. The Court has its proper role as in the case of a motion to dismiss as a matter of law before or after trial; as does the jury in the case of an issue of fact. As the jury may sometimes overstep its bounds, U.S. v. Dennett, 39 F.2d 564, so also may a lower court, People v. Birch All State News, et al., 269 N.Y.S.2d 752, 754 (May 2, 1966), reversing 40 Misc.2d 626, 243 N.Y.S.2d 525 (September 6, 1963).

The test which defines the respective role of the court and a jury in a civil obscenity case is similar to that stated by Justice Brennan in his dissent in Kingsley Books, Inc. v. Brown, 354 U.S. 436, 448, 1 L.Ed.2d 1469, 77 S.Ct. 1325 (June 24, 1957):

> "Of course, as with jury questions generally, the trial judge must

> initially determine that there is a jury question, i.e., that reasonable men may differ whether the material is obscene."

In civil actions involving the determination of obscenity by a jury, one of the basic functions of the trial court, as in negligence cases involving the standard of care, must be to determine whether the issue which is before the court is one of law or one of fact. In making that determination, the trial court must decide whether the subject matter is: (1) obscene as a matter of law, (2) a question of fact for the jury, or (3) constitutionally protected as a matter of law. If the subject matter is obscene "as a matter of law", the court must so instruct the jury, just as is its duty in tort cases to instruct that given conduct is "negligence" "as a matter of law".

In criminal cases involving the determination of obscenity in the

criminal context, a different situation is presented. On a motion to dismiss, either before a jury trial or after the jury trial, on the ground that the subject matter is protected by the Federal Constitution as a matter of law, the court must decide only whether the subject matter is: (1) constitutionally protected as a matter of law, or (2) is a question of fact for the jury's determination under proper instructions. This is so because of the constitutional right to a jury trial on all issues in criminal cases. The question of whether the subject matter is obscene as a matter of law does not present itself in a criminal case.

In the trials of Pope and Morrison, the issue of "value" which was before the two Illinois juries was, of necessity, a purely <u>factual</u> issue. That is so because of the <u>procedures</u> which

were pursued by the Petitioners during trial. The written pre-trial "Motions to Dismiss" of Pope and Morrison (J.A. 6-10, 20-24) raised not one but two constitutional questions for the trial court to decide: (1) whether the three magazines in each of the cases were protected as a matter of law, in which event the criminal charge should not be submitted to the jury, and (2) whether it was constitutionally possible for the Illinois State Legislature to enact a criminal obscenity statute which allowed the issue of "value", in relation to a criminal charge, to be submitted to the jury as a question of fact based upon the Illinois community standard. The trial judge, in denying the Petitioners' motions to dismiss the criminal complaints on the ground that the subject matter was constitutionally protected, answered the first constitu-

tional question; it therefore was entirely proper and, in fact, necessary for the court to submit the criminal charge and issue of "value" to the jury as a factual issue based upon the Illinois community standard. Because it was a criminal trial, the court could not advise the jury that it was "hard-core pornography", as in fact it was.

II

PETITIONERS' SECOND CHALLENGE-- THAT THE ILLINOIS STATUTE CANNOT BE CONSTITUTIONALLY APPLIED TO THE DEFENDANTS AND THE SUBJECT MATTER-- PLACES IN ISSUE THE NATURE AND SCOPE OF THE FEDERAL REVIEW OF STATE OBSCENITY DETERMINATIONS. ON THAT ISSUE, AMICUS URGES THIS COURT TO ADOPT THE HARLAN "RATIONALITY" TEST EXPRESSED IN JACOBELLIS V. OHIO, UNDER WHICH PETITIONERS' CONSTITUTIONAL CLAIM MUST BE REJECTED.

At Point II of the Brief for Petitioners, a claim is made that the Illinois Obscenity Statute (Ill. Rev. Stat., 1983, Ch. 38, para. 11-20(a)(1)) is unconstitutional as applied to the

defendants and the six (6) magazines in question. That challenge places in issue the nature and scope of federal review of state obscenity determinations. On that issue, Amicus urges this Court to retreat to and adopt the Harlan view expressed in Jacobellis v. Ohio.

By adopting the Harlan view of federal review (hard-core Pornography) and state review (rationality test) of obscenity determinations, this Court can achieve three worthwhile objectives: (1) it can return to state obscenity determinations the sound traditional legal principles espoused by Justice Learned Hand, the architect of modern obscenity law, which analogized the factual determination of "negligence" and "standard of due care" to the factual determination of "obscenity" and the "standard of common decency in the community"; (2) it will nullify the bad

law expressed in Jacobellis regarding "The Lovers" case, which removed from state courts the power to criminally proscribe the explicit depiction of sexual intercourse upon the public screens, a function which traditionally has belonged to state governments; and (3) it will restore to the federal government its primary and preemptive (but limited) responsibility for the suppression of "hard-core pornography". See, here, the test for "hard-core pornography" set forth in Morris v. U.S., 257 A.2d 341 (1969): "reasonable men could not differ and could come to but one conclusion; i.e., that the material or performance is sexually morbid, grossly perverse, and bizarre, without any artistic or scientific purpose or justification".

(A) Under Justice Harlan's Test For Federal Review Of Federal Obscenity Determinations, The Federal Statutes May Only Proscribe "Hard-Core Pornography".

Under Federal law, "obscenity" has been declared to be "contraband", U.S. v. 37 Photographs, 402 U.S. 363 at 376. Amicus submits that 19 U.S.C. § 1305(a) which declares that "obscene" subject matter under Federal law is "contraband" must be construed as establishing a "pre-emption" and demonstrates that Justice Harlan's view is correct in that, to reconcile such a federal "forfeiture" with traditional state powers relating to personal property rights, requires that the term "obscenity" under federal standards be restricted to "hard-core pornography".

"Forfeiture" relief relating to the illegal character of the property itself (i.e., whether or not it is capable of ownership) is not the same type of

"forfeiture" penalty which arises in connection with the use of automobiles in narcotic, or money in gambling cases, wherein the court litigates the illegality of the activity involved. In the latter case the court declares a cessation of property rights which did at one time exist in said material. This stands in sharp contrast to the remedy of equitable forfeiture pursuant to 19 U.S.C. § 1305(a) where obscene material is the subject of the action. A judicial declaration of forfeiture pursuant to the federal importation statute, 19 U.S.C. § 1305(a), mandates the forfeiture of obscene material, not as a remedy for illegal conduct, but incident to a determination of status, i.e., that no property rights ever existed in said property. See U.S. v. 37 Photographs, supra. See, also, Warsaw v. Eastman Kodak Co., 252 S.E.2d

182 (Jan. 11, 1979).

It would appear that because of the federal provision on forfeiture, federal law has occupied the field, at least on the question of whether "hard-core pornography" is to be tolerated. Accordingly, the disposition of "hard-core pornography", inherently, is a matter for federal control (Harlan's view). The network of federal statutes bears this out. In Congress assembled, the representatives of the several states have established a comprehensive set of federal controls on obscenity over: (1) importation from abroad, (2) use of the mails, and (3) transportation in interstate commerce. See 18 U.S.C. §§ 1461-1465, 1735, 1737; 19 U.S.C. § 1305. Those controls have been supplemented by treaty abroad. See Roth v. U.S., 354 U.S. 476 at footnote 15, which refers to the 1911 "Agreement for

the Suppression of the Circulation of Obscene Publications", 37 Stat. 1511-1515, wherein the United States expressed the national desire to repress "offenses connected with obscene publications" and entered into a mutual compact with other nations to that end.

While Congress has never established a definition of obscenity, it has not been silent about whether or not obscenity should be proscribed at the federal level, cf., Justice Harlan's discussion of the category of obscenity, "hard-core pornography", and federal power in relation thereto, cited with approval in Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 431, 93 S.Ct. 2607. See also, the Congressional finding of fact and declaration of policy in Public Law 90-100, 81 Stat. 253, enacted October 3, 1967, creating the Commission on Obscenity and

Pornography, which held that the traffic in obscenity and pornography is a matter of nation concern. See § 1 of Public Law 90-100 which provided:

> "Section 1. Finding of fact and declaration of policy. -The Congress finds that the traffic in obscenity and pornography is a matter of national concern. The problem, however, is not one which can be solved at any one level of government. The Federal Government has a responsibility to investigate the gravity of this situation and to determine whether such materials are harmful to the public, and particularly to minors, and whether more effective methods should be devised to control the transmission of such materials. The State and local governments have an equal responsibility in the exercise of their regulatory powers and any attempts to control this transmission should be a coordinated effort at the various governmental levels."

In Roth v. U.S., 354 U.S. 476 at 484, this Court took notice of the primacy of the role of the National Government:

> "But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This

> rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, . . ."

(B) Under The "One People" Concept The Federal Government Has Primary Jurisdiction Over "Hard-Core Pornography" (Harlan's View).

Obscenity is, under the "one people" concept, a matter of state and federal interest. Independent federal interests have been "identified" by this Court in the well-documented views of Justice Harlan. See, for example, Roth v. U.S., 354 U.S. at 497-498. Amicus submits that the foundation for Harlan's views are to be found in the "one people" concept.

The "one people" concept of federalism (see Hoke v. U.S., 277 U.S. 308 (Feb. 24, 1913)), envisions the federal government as having been granted plenary power to control the

mails and interstate commerce, and charged with the concomitant duty and responsibility of administering those controls, which have been established by their representatives at the national level, in a way which will safeguard the standards of public decency (morality) which are common to the individual State members of the compact. Under the "one people" concept, the federal government has total control over subject matter as to which reasonable minds would not differ and all would hold to be pornographic (hard-core pornography). See Part XIV, entitled "The 'One People' Concept", appearing in "The Challenge of a Modern Federal Criminal Code, Statement in the U.S. Senate by Senator John L. McClellan, March 11, 1971, in Hearings Before the Subcommittee on Criminal Law and Procedures of the Committee on the Judiciary, United

States Senate, Ninty-second Congress, First Session, Part 1", at page 30. */

*/ XIV. THE "ONE PEOPLE" CONCEPT. Between the Code of 1909 and the codification of 1948, a number of significant new Federal criminal offenses were enacted. Their significance can be best understood, however, by prefacing their consideration by a reference to Madison's conception of the scope of the powers of the Federal Government. In the Federalist No. 44, he observed:

The powers delegated by the proposed Constitution to the Federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiations, and foreign commerce; with last the power of taxation will, for the most part, be connected. The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the state.

This limited conception of the role of the Federal Government stands in sharp contrast, of course, with what as a matter of history has come to pass. For example, in June, 1910, less than 6 months after the Code of 1909 went into effect, Congress passed the Mann Act, a provision against the "moral misuse" of the facilities of interstate commerce. (Act of June 25, 1910, c. 395, 36 Stat. 825.) In Hoke v. United States, 277 U.S. 308, 322 (1913), upholding the act, Mr. Justice McKenna employed expressions which, when considered, serve as a reminder that, since 1872, Congress had been acting, intermittently, upon a principle foreign to Madison's that did not come into application until after the

In granting such obscenity controls to the Federal government, it was the expectation of the compact States that the Federal government would administer those powers to suppress that subject

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(Footnote continued from preceding page.)
Civil War. He said:

"Our dual form of government has its perplexities . . . but it must be kept in mind that we are one people . . . and the powers (granted to the Federal government) . . . are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral."

The inference is plain. Lotteries, frauds, circulation of obscene literature, prostitution, narcotic addiction, all were, at first, well within what Madison had in mind when he commented that the powers reserved to the States extended to "all objects which, in the ordinary course of affairs, concern . . . the internal order, improvement, and prosperity of the state." The trouble was that it proved, as we became not only one people, but one nation, impossible for the States, under their own powers, effectually to preserve "internal order" in these matters when the facilities of the mails were seen to operate, in one fashion, and the privileges of interstate commerce, in another, to negate the efforts of any state to suppress what the people of the nation saw as national evils. In the judgment of many, these evils were pervasive throughout the whole nation. There were, moreover, Federal constitutional powers under which they could be attacked by the enactment of federal criminal legislation. From time to time, therefore, Congress made use of the powers assigned to the general government, singly or in combination, "to promote the general welfare, material and moral."

matter which was considered to be injurious to the public morals of all of the States as a whole, as declared by their representatives in federal legislation. See Champion v. Ames, 188 U.S. 321, 23 S.Ct. 321, 47 L.Ed. 492 (1903), where the court said at pages 356 and 357:

> " If a state, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another? In this connection it must not be forgotten that the power of Congress to regulate commerce among the States is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution. . . . But surely it will not be said to be a part of anyone's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the States an element that will be confessedly injurious to the public morals. . . . As a State may, for the purpose of guarding the morals of

> its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the 'widespread pestilence of lotteries' and to protect the commerce which concerns all the States, may prohibit the carrying of lottery tickets from one State to another. In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States--perhaps all of them-- which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. . . ." (Our emphasis.)

In enumerating his "hard-core pornography" rule limitation on federal power, Harlan used as a common denominator that "bottom of the barrel"

quality of material as to which it might be said that reasonable minds would not differ, and could come to but one conclusion.

At page 21 of the "Brief for the Petitioners", it is noted that: "seven states currently have no statutes which proscribe the dissemination of sexually explicit materials to adults (Alaska, Maine, Montana, Oregon, South Dakota, Vermont and Wisconsin). Although this Court said in Paris Adult Theatre I v. Slaton, 413 U.S. 49 at 64, 37 L.Ed.2d 446 at 461, 93 S.Ct. 2628, June 21, 1973:

> " The States, of course, may follow such a 'laissez faire' policy and drop all controls on commercialized obscenity, if that is what they prefer, just as they can ignore consumer protection in the market place, but nothing in the Constitution compels the States to do so with regard to matters falling within state jurisdiction. . . . " (Our emphasis.)

this Court did not say that hard-core

pornography, which under federal law may not be imported, may not be placed in the mail, may have no property value, may not be copyrighted and may not be sent interstate, can nevertheless be given a legal status and value within such states. See Smith v. U.S., supra. See, in this regard, the expression in Roth-Alberts, 354 U.S. 476, 485, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (June 24, 1957) that it is the universal judgment of civilized nations as reflected in their international agreements, that obscenity should be restrained. This Court can clarify its ambiguous statement in Paris Adult Theatre I, supra, by embracing the Harlan view expressed in Roth v. U.S., 354 U.S. 476, at 500, and explaining that what the Court was talking about, in so far as States are concerned, was subject matter within their jurisdiction, which was

less than "hard-core pornography" (reasonable men would not differ and could come to but one conclusion), and yet not quite "protected speech", (Justice Harlan's view).

(C) Under Justice Harlan's "Rationality" Test For Federal Review Of State Obscenity Determinations, The Petitioners' Constitutional Claims Must Be Rejected.

By way of contrast, under Justice Harlan's view, the federal test for review of state obscenity determinations is simply one of "rationality". Accordingly, under Justice Harlan's "rationality" test and this Court examination of the Illinois statute and magazines in question, the Petitioners' constitutional claims must be rejected. See Jacobellis v. Ohio, 378 U.S. 184 at 204:

> ". . . As to the States, I would make the federal test one of rationality. I would not prohibit them from banning any material

> which, taken as a whole, has been reasonably found in state judicial proceedings to treat with sex in a fundamentally offensive manner, under rationally established criteria for judging such material.
>
> " On this basis, having viewed the motion picture in question, I think the State acted within permissible limits in condemning the film and would affirm the judgment of the Ohio Supreme Court."

Further, were a federal statute being applied, the six (6) magazines would also constitute "hard-core pornography" under the federal standard. See Associate Justice Rehnquist's opinion, speaking for a majority of this Court in New York v. P.J. Video, Inc., ___ U.S. ___, 89 L.Ed.2d 871 at 881 (Apr. 22, 1986).

III

THE ATTEMPT OF AMICUS CURIAE TO CONTAIN "HARD-CORE PORNOGRAPHIC EXHIBITIONS" IN SANTA ANA HAS BEEN MADE MORE DIFFICULT BY A LACK OF ENFORCEMENT OF THE FEDERAL LAWS AGAINST "HARD-CORE PORNOGRAPHY". THIS COURT SHOULD ADDRESS THAT PROBLEM AND ENUNCIATE A STRONG JUDICIAL POLICY AGAINST THE EXHIBITION OF "HARD-CORE PORNOGRAPHY".

Notwithstanding the comprehensive nature of the above network of federal obscenity laws, the enforcement of those federal laws against "hard-core pornography" by the administrative branch of the Federal Government has come to a virtual standstill. As a result, the prediction of defendant theater operator James Mitchell in 1978 at Santa Ana's first public nuisance abatement trial, that the hard-core pornographic films then being exhibited at the Mitchell Brothers' Santa Ana Theater would be regularly exhibited on television within 5 years, has become a reality.

Amicus Curiae submits that the obscenity opinions of this Court during the past 30 years (since Roth-Alberts) have not articulated a strong judicial policy which is supportive of the federal legislative policy against "hard-core pornography". As a result, there is a corresponding diminished support in the State courts for the enforcement of state laws proscribing "hard-core pornography". What is needed is a judicial expression from this Court of strong support for the proscription of "hard-core pornography". It is the opinion of this Amicus that if such a pronouncement were forthcoming, as hereinabove suggested is possible under the issues framed in this Petition, the problems of Amicus Curiae in the containment of such materials at the State level would be materially lessened.

CONCLUSION

The Illinois State Legislature was not precluded from requiring that in a criminal trial the "value" test of the State Obscenity Statute be determined by the Illinios jury based upon an Illinois community standard rather than an objective standard. Under the "rationality" test for federal review of state obscenity determinations. the Illinios State Obscenity Statute is Constitutional, both on its face and as applied to the six (6) magazines. Further, were this Court reviewing a federal jury determination in a criminal trial based on one of the federal statutes, the result would be the same because the six (6) magazines would qualify as "hard-core pornography" under the federal standard of review of federal obscenity determinations.

DATED: December 22, 1986

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, hereby certify that on this 23rd day of December, 1986, the original and forty (40) copies of the within Amicus Curiae Brief of the City of Santa Ana, California, were deposited in the United States Post Office in Sun Valley, California, with Express Mail Postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies were also mailed, First Class postage prepaid, to the below listed parties to the proceedings and that all parties required to be served have been served:

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